02-3423

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 02-3423

In the Interest of Jerrell C.J.
A Person Under the Age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent-[redacted]

v.

JERRELL C.J.,

Respondent-Appellant-Petitioner.

ON APPEAL OF A DELINQUENCY ADJUDICATION AND DENIAL OF POSTDISPOSITION MOTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE FRANCIS T. WASELIEWSKI PRESIDING

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT-PETITIONER

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BRIEF OF RESPONDENT-APPELLANT-PETITIONER

ISSUES PRESENTED

I. **14-YEAR-OLD JERRELL C.J. WAS ARRESTED, BOOKED, HANDCUFFED TO A WALL IN A POLICE INTERROGATION ROOM FOR TWO HOURS, THEN QUESTIONED FOR MORE THAN FIVE HOURS BY TWO DETECTIVES. THEY**

DISBELIEVED HIS DENIALS, AND ONE SOMETIMES RAISED HIS VOICE. WHEN JERRELL ASKED SEVERAL TIMES TO TALK TO HIS PARENTS, THE DETECTIVES SAID "NO." UNDER THE TOTALITY OF THE CIRCUMSTANCES, WAS JERRELL'S INCULPATORY STATEMENT VOLUNTARILY MADE?

The trial court held: Yes.

The court of appeals held: The trial court did not err in denying the motion to suppress. However, the court "cautioned" that "a juvenile's request for parental contact should not be ignored." (Ct. App. Op. ¶ 1; App. 143).

II. SHOULD THIS COURT ADOPT A *PER SE* RULE, EXCLUDING IN-CUSTODY ADMISSIONS FROM ANY CHILD UNDER THE AGE OF 16, WHO HAS NOT BEEN GIVEN THE OPPORTUNITY TO CONSULT WITH A PARENT OR INTERESTED ADULT?

The trial court did not address this issue.

The court of appeals held: Although the court found the request for a *per se* rule "compelling," it was without authority to order it, under ***Theriault v. State***, 66 Wis. 2d 33, 223 N.W. 2d 850 (1974). (Ct. App. Op., ¶ 27; App. 153).

III. SHOULD THIS COURT ADOPT A RULE EXCLUDING IN-CUSTODY ADMISSIONS RESULTING FROM JUVENILE INTERROGATIONS THAT WERE NOT ELECTRONICALLY RECORDED?

The trial court held: The trial court did not address this issue, although commented that it wished it had a

videotape of the interrogations in this case. (50:109, 113).

The court of appeals held: "Some suggest that the 'totality of the circumstances' analysis works best when it is based on a videotape of the interrogation. It is this court's opinion that it is time for Wisconsin to tackle the false confession issue. We need to take appropriate action so that the youth of our state are protected from confession to crimes they did not commit. We need to find safeguards that will balance necessary police interrogation techniques to ferret out the guilty against the need to offer adequate constitutional protections to the innocent." (Ct. App. Op., ¶ 32; App. 156).

IV. WAS JERRELL J.'S UNCORROBORATED ADMISSION RELIABLE, PROVIDING SUFFICIENT EVIDENCE TO ADJUDICATE HIM GUILTY OF THE OFFENSE?

The trial court held: Yes.

The court of appeals held: Although this was raised as a separate issue, the court did not directly address it. Rather, it considered reliability as a factor in determining whether the admission was voluntary.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case raises constitutional and other issues and of statewide concern, and therefore merits oral argument and publication.

STATEMENT OF THE CASE

A petition filed on May 29, 2001, charged 14-year-old Jerrell J. with armed robbery, party to a crime. (2). He denied guilt, and moved for suppression of an

admission he had made to Milwaukee City police detectives. (46:7; 5).

Jerrell's case was tried jointly with a co-defendant, Jerrad H., to the Honorable Francis Wasielewski. The court heard and denied both boys' motions to suppress admissions to police. (50:109-21; 52:19-25; App. 104-09).

Based on their admissions, the court adjudicated Jerrell and Jerrad delinquent. (52:175-183; App. 110-18). They were placed in the Serious Juvenile Offender Program, with placement at Ethan Allen School. (14, App. 101-02; 53:42-57).

The trial court denied Jerrell's postdisposition motion to vacate the delinquency finding and suppress evidence (41; App. 103; 58:44-66; App. 119-41). The court of appeals affirmed.

This court accepted review on March 23, 2004.

STATEMENT OF FACTS

A McDonald's restaurant in Milwaukee was robbed just after midnight on Saturday, May 26, 2001.[1] Videotape showed three people walking in wearing dark clothes and ski masks. Two went to the kitchen and ordered employees to lie down on the floor. One went to the office, where the manager put $3590 in his bag. All three then ran out.

One person, an employee police suspected had unlocked a door for the robbers, was detained that morning. Three others were detained and arrested as suspects in the robbery on Sunday evening. (48:94-101). Jerrell J. was arrested as a suspect in his home the next morning.

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[1] The Court of Appeals opinion, ¶ 2, states the wrong date.

Interrogation

Fourteen-year-old Jerrell J. was arrested at 6:20 a.m., taken to the police administration building, booked, and placed in a six-by-eight foot interrogation room. He was handcuffed to the wall and left alone for approximately two hours. (51:6, 10, 25-26, 43-44).

Police detectives Spano and Sutter entered, removed the handcuffs, and asked Jerrell background questions, at about 9:00 a.m. Detective Spano testified that he advised Jerrell of his ***Miranda*** rights at 9:10 a.m., stopping after each right to ask Jerrell if he understood. Each time, Jerrell said "yes." ***Miranda*** rights were completed in "just a few minutes," with no further questions or explanations. (51:11-12, 26-28; 55:42). Postdisposition, Jerrell said police did not give him ***Miranda*** warnings, but the court did not credit that testimony. (54:62-63; 58:135-36).

Detective Spano told Jerrell that his cousin, Jerrad had "laid him out for this robbery." Jerrell said "that he didn't commit any robbery." Spano said he didn't believe him. He admonished Jerrell to be "truthful and honest about his participation." (55:45-46).

"Back and forth for the better part of the morning," Jerrell denied any participation as the detectives urged him to admit. Both detectives repeated the same theme—admitting guilt was the "morally correct" thing to do, and "in the eyes of a judge down the road, it might be a good route for him to take or words to that effect." (55:47-49; 85-86).

At times, Detective Spano raised his voice: "I'm raising my voice short of yelling at him. . . . there were points I needed to make, and I needed to make them with a strong voice. But not yelling." (51:30, 36; 55:84). Jerrell described the "raised voice," testifying: "I'm not quite sure but it's like he was angry with me. That sort of

tone in his voice." It made him feel "kind of frightened." (51:49).

Detective Spano told Jerrell "that he committed an adult crime here and he has got to start standing up for what he did." (55:83). He told him that "if he were an adult he would be looking at 60 years in prison," but said that "as a juvenile he was catching . . . catching a break." (55:108). Postdisposition, Jerrell testified that police told him he would get 65 years in prison if he didn't admit the crime, but the court did not credit that testimony. (54:85; 58:136).[2]

Detective Spano made the point, "he has got to start standing up for what he did" repeatedly during the morning—he estimated four, five or six times. (55:84). All morning, according to Spano, Jerrell was "in his denial stage." (51:28). Jerrell described himself as "feeling kind of very uncomfortable." (51:49).

Jerrell was kept in the interrogation room until lunchtime. Several times one or both detectives would leave for a few minutes. "Sometimes" they just stood up and walked out; other times "I [Spano] might say think about what I just said, Jerrell, or words like that." (55:83).

Jerrell was placed in a bullpen cell for about 20 minutes, where he ate lunch. (51:17). Interrogation resumed at approximately 12:30 p.m. Detective Spano said Jerrell "started opening up about his involvement and everybody else's" somewhere between 1:00 and 1:30 p.m. (51:31).

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[2] Co-defendant Jerrad made a similar claim - that police told him if he did not admit guilt he "would go to jail until I was 19 and waived into adult court and be sent to prison." (50:71). As in Jerrell's case, the court instead credited the police detective's testimony that no threats or promises were made (50:114-15). However, the court twice said that it wished it had a videotape of the interrogation. (50:109, 113).

"Several times," Jerrell asked "if he could make a phone call to his mother or father." Detective Spano said "no." (51:30,37). Detective Spano testified that he had "never" in 12 years allowed a juvenile to contact parents during interrogation. (55:32). It might "stop the flow," and jeopardize his "control" of the interrogation:

> If I don't have any control about what he can say over the phone or what he can do when he has got the phone in his hand, I don't think it is prudent or proper to let him do that.

55:79.

Detective Spano affirmed that he "needed to control this interrogation." (55:80).

"Numerous conversations" during interrogation focused on "what would be the outcome after the interview was over." (52:11). In response to Jerrell's questions, Detective Spano told him he "would be spending the night at the [detention] center for sure and that I didn't have any control over his fate after that." Jerrell testified that Detective Spano "guaranteed" or "promised" that he would spend a night in the detention center and go home the next day, but again, the court did not credit his testimony. (51:50: 52:19-25).[3]

When Jerrell asked about school, Detective Spano replied, "I would make it my business to call the district attorney and explain . . . he'd like to be able to be released to finish school." (51:38).

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[3] Co-defendant Jerrad also testified that when he was interrogated, detectives told him he could go home if he made an inculpatory statement. (50:71). As in Jerrell's case, the court credited the police detective's testimony that no threats or promises were made. (50:114-15). But again, the court twice said, it wished it had a videotape of the interrogation. (50:109, 113).

The interrogation concluded at 2:40 p.m., when Detective Spano wrote out a confession and had Jerrell sign it.

The trial court found that Jerrell's requests for food and bathroom breaks were honored during the 5 ½ hour interrogation. Postdisposition, Detective Spano said that Jerrell had not asked to use the bathroom. (55:75). The court did not credit Jerrell's postdisposition statement that his requests to use the bathroom and for food were denied. (58:136).

The court found that Jerrell was not distraught, or emotionally or mentally ill; that he was not under the influence of drugs or alcohol; and that he didn't perceive himself as being in physical danger during the interrogation. (52: 23-24; App. 107-8).

The court found that Jerrell was articulate and seemed to be in "the higher range" of intelligence. (52:23; App. 107). Postdisposition standard IQ testing showed that Jerrell was in the low average range of intelligence. Jerrell's prior school records, showing average to failing grades, confirmed the validity of the testing. (54:54-59). However, the court refused to consider the IQ test, saying it was based on what Jerrell told the examining forensic psychologist and, in the court's view, Jerrell was not credible. (58:62; App. 137).[4]

Postdisposition testing also showed that Jerrell was highly suggestible and highly vulnerable to endorsing leading questions. His responses placed him in the top five percent of the population for suggestibility. (54:82-84). Although the examining forensic psychologist

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[4] Forensic psychologist Dr. Antoinette Kavanaugh, who tested Jerrell, testified that she is the Clinical Director of the Clinical Evaluations and Services Iniative in the Cook County, Illinois, juvenile courts. (54:38-40).

testified that the nature of Jerrell's response showed that he did not try to manipulate the results of the test, the trial court rejected the test findings because of its belief that Jerrell was not credible. (54:84; 58:62).

Finally, a postdisposition test applying four instruments to measure a person's understanding and appreciation of ***Miranda*** rights showed that Jerrell did not have an adequate understanding of the right to counsel, the right to silence, or the inherent adversarial nature of police interrogation. (54:63-67). Again, the trial court rejected the test findings because Jerrell was not credible. (58:62).

Reliability

The statement Jerrell signed said he wore a dark t-shirt, fashioned around his face like a mask. (52:29). McDonald's employees described the robbers as wearing knit face masks, or ski masks. (49:57; 50:58). Detective Sampon testified that it appeared from the surveillance tape that all three robbers were wearing ski masks. (55:131).

The robber police later identified as Jerrell was described as being 17-19 years old by one employee and as 18-23 by another. (49:57; 50:58). Jerrell was 14.

One employee described the robber police later identified as Jerrell as holding a small black gun and "the inside of the barrel was red." (50:54). The statement Jerrell signed stated that he carried a "black toy pistol with some orange tape around the barrel." (52:29).

Jerrell testified he had learned about the gun and other details of the robbery from the interrogating detectives. (52:145-52). Detective Spano denied providing such details, and the court credited Spano's testimony. (52:36, 175-83). Postdisposition, when Detective Spano was asked to describe the markings of a

toy gun, he said: "Often times they will put an orange piece of tape around the tip of the barrel." (55:126).

Jerrell's written statement said the robbers took about $3,600. It said he received $100, with which he bought shoes and a baseball cap. (52:31). Police did not find new shoes, a new baseball cap, or $100 in Jerrell's possession. (55:124-25). Jerrad's written statement said he and Jerrell each received $800. (50:140).

Jerrell's written statement said "Melvin" was the getaway driver, that they used Melvin's car, and that they put their masks and guns in the trunk. (52:28-32). Police never found Melvin, his car, the masks or the guns. (52:145; 55:124-125). Jerrad's statement did not mention Melvin. It said that they used a car belonging to the third suspect, "Roscoe." (50:139).

The trial court found Jerrell guilty based on the confession. It pointed to two details "the orange gun barrel," and the total amount of money taken ($3,600) as evidence of the statement's credibility. (52:175-183; App. 110-18.)

ARGUMENT

I. FOURTEEN-YEAR-OLD JERRELL C.J.'S WRITTEN STATEMENT, MADE AFTER BEING LEFT ALONE HANDCUFFED TO A WALL IN AN INTERROGATION ROOM FOR TWO HOURS, QUESTIONED FOR MORE THAN FIVE HOURS BY TWO DETECTIVES WHO REFUSED TO BELIEVE HIS REPEATED DENIALS AND ONE OF WHOM RAISED HIS VOICE SEVERAL TIMES, AND AFTER JERRELL'S SEVERAL REQUESTS TO TALK TO HIS PARENTS WERE DENIED, WAS NOT VOLUNTARY.

A. Introduction and standard of review.

The constitutional right to be protected from self-incrimination applies to a juvenile charged with delinquency. ***In re Gault***, 387 U.S. 1, 55 (1967); ***Theriault v. State***, 66 Wis. 2d 33, 39, 223 N.W. 2d 850 (1974).

A defendant's statements are voluntary "if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 308, 661 N.W. 2d 407; ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W. 2d 759 (1985).

The truthfulness or reliability of a confession "can play no role in determining whether that confession was voluntary." ***State v. Agnello***, 226 Wis. 2d 164, 174, 593 N.W. 2d 427 (1999). The court of appeals opinion in this case erroneously cited with apparent approval the trial court's reliance on the reliability of Jerrell's statement to support its conclusion that the statement was "voluntary and not a product of coercion." (Ct. App. Op. ¶ 22; App. 151).

On review, the court gives deference to the trial court's findings of historical fact. However, the application of the constitutional principles to the facts is reviewed ***de novo***. ***Hoppe, supra*** at ¶ 34. Again, the court of appeals erred by deferring to the trial court's legal conclusions. For example, it deferred to conclusions that denying Jerrell's requests to talk to his parents "did not constitute improper police conduct," that his education and intelligence "did not interfere with Jerrell's ability to give a voluntary statement," and that "Jerrell's age did not result in a statement that was a product of 'adolescent fantasy.'" (Ct. App. Op. ¶¶ 15, 17, 19; App. 148-49).

B. Under the Totality of the Circumstances, Jerrell's Inculpatory Statement Did Not Result From a Knowingly and Voluntarily Waiver of His Rights.

If a person makes an inculpatory statement during police interrogation without the presence of an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." ***Miranda v. Arizona***, 384 U.S. 436, 475 (1966).

While coercive police conduct is a prerequisite for a finding of involuntariness, the totality of the circumstances requires "a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." ***Hoppe, supra*** at ¶ 38. Further:

> [P]olice conduct does not need to be egregious or outrageous in order to be coercive. Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures.

Id. at ¶ 46.

The "condition" of being a child makes one uncommonly susceptible to suggestive and coercive police interrogation techniques. In fact, "the Supreme Court has consistently recognized that a confession or waiver of rights by a juvenile is not the same as a confession or waiver by an adult." ***A.M. v. Butler***, 360 F. 3d 787, 799 (7th Cir., 2004).

This constitutional distinction between children and adults is based on: "the peculiar vulnerability of

children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." ***Bellotti v. Baird***, 443 U.S. 622, 634 (1979).

All three of these reasons for constitutional distinctions between children and adults are relevant to police interrogations. Therefore our courts have long recognized that evaluation of "totality of the circumstances" in cases involving children, requires special care:

> [W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.

Haley v. Ohio, 332 U.S. 596, 599 (1948).

Nineteen years later, the Court again reiterated this standard in ***In re Gault***, pointing out that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." 387 U.S. at 52. The Wisconsin Supreme Court adopted the ***Gault*** standard in ***Theriault v. State, supra.***

The totality of the circumstances analysis in juvenile cases must include an evaluation of "the juvenile's age, experience, education, background and intelligence, whether the questioning was repeated or prolonged, and the presence or absence of a friendly adult such as a parent or an attorney." ***A.M. v. Butler***, 360 F. 3d at 799, citing ***Fare v. Michael C.***, 442 U.S. 707, 725 (1979).

> This totality of circumstances must be considered with "the greatest care . . . to assure that the admission was voluntary in the sense not only that it was not coerced or suggested, but also that it was

> not the product of ignorance of rights or of adolescent fantasy, fright or despair."

In re Gault, supra at 55.

In this legal and factual context, the circumstances of Jerrell's interrogation, as well as his own personal characteristics, are discussed below.

1. Age.

Jerrell J. was 14-years-old at the time he was interrogated. In ***Hardaway v. Young,*** 302 F. 2d 757 (7th Cir. 2002), the court said, at 764-65:

> The difficulty a vulnerable child of 14 would have in making a critical decision about waiving his *Miranda* rights and voluntarily confessing cannot be understated.
>
> . . . .
>
> . . . youth remains a critical factor for our consideration, and the younger the child the more carefully we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or simple immaturity that would not affect an adult has tainted the juvenile's confession.

In ***A.M. v. Butler***, the court again stressed the importance of age, saying a "defendant's age is an important factor in determining whether a confession is voluntary." 360 F. 3d at 799.

In ***Haley v. Ohio,*** 332 U.S. at 599, Haley's "tender and difficult age of 15" was a major factor favoring suppression of his confession. Similarly in ***Gallegos v. Colorado***, 370 U.S. 49, 54 (1962), the court wrote about the 14-year-old defendant:

> But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and

> understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

In ***Thompson v. Oklahoma,*** 487 U.S. 815, 834 (1988), the court ruled that imposing the death penalty on children who were 15 and younger at the time of the crime was cruel and unusual punishment, pointing out "broad agreement on the proposition that adolescents are less mature and responsible than adults." It cited, at 834, its decision in ***Eddings v. Oklahoma***, 455 U.S. 104 (1982), stating:

> But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Id., 115-16, citing ***Bellotti v. Baird, supra***.

The Wisconsin legislature agrees with this principle. Enacting Wis. Stat. § 48.375 regarding parental consent for abortion, it found:

> Immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences.

Wis. Stat. § 48.375(1)(a)1.

Jerrell was not only an adolescent, but was also, at age 14, a *young* adolescent. The ***Thompson*** decision, for example, quoted the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, saying "adolescents, *particularly in the early and middle teen years*, are more vulnerable, more

impulsive, and less self-disciplined than adults." 478 U.S. at 834 (emphasis added).

Empirical research on understanding of ***Miranda*** warnings shows that adolescents generally demonstrate less understanding of the warnings than adults. The younger the adolescent, the less they understood the warnings. As a class, juveniles younger than 15 years old "failed to exhibit the minimum level of understanding required" to make their waivers "meaningful." Dr. Thomas Grisso, ***Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis***, 68 Cal. L. Rev. 1134, 1160-61 (1980).

More recently, an empirical study concluded that 14- and 15-year-old children were "twice as likely as young adults to be seriously impaired in their competence to stand trial." Juveniles under 16 are far more likely than young adults to make choices reflecting a propensity to comply with adult authority figures, such as confessing to police rather than remaining silent. Grisso, et al., ***Juvenile's Competence to Stand Trial: A Comparison of Adolescents and Adults Capacities as Trial Defendants,*** at http://www.mac-adoldev-juvjustice.org, at page 25, 30.

Jerrell's young age, therefore, is a strong factor weighing against a conclusion that his admission was the result of his knowing and voluntary waiver of his constitutional rights.

2. Denial of Requests to Speak to Parents.

Thirty years ago this court rejected a *per se* rule requiring parental presence in juvenile interrogations. However, it stressed the importance of parental presence in the totality of the circumstances analysis:

> The failure to promptly notify [parents] and the reasons therefore may be a factor, however, in

> determining whether the confession was coerced or voluntary. **If the police fail to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements.** On the other hand where, as in the instant case, defendant was fully advised of his rights, and where he failed to avail himself of the opportunity given him to make a phone call and specifically requested the police not to call his semi-invalid grandmother because he was afraid it might adversely affect her health, an inference of coercion should not be drawn.

Theriault v. State, 66 Wis. 2d at 48 (emphasis added).

Parental counsel and advice has been recognized as a crucial protection against coercion and intimidation, in ***Haley v. Ohio,*** 332 U.S. at 600:

> He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard . . . No counsel or friend was called during the critical hours of questioning.

Similarly, in ***Gallegos v. Colorado***, 370 U.S. at 54, the Court wrote about the 14-year-old defendant:

> He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators.

In re Gault stressed the particular importance of parents, singling out "the age of the child and the presence and competence of parents," as crucial to the voluntariness analysis. ***Id.*** 387 U.S. at 55.

In ***United States v. Wilderness***, 160 F. 3d 1173, 1176 (7th Cir. 1998), the court pointed out:

> In easier to overbear the will of a juvenile than of a parent or attorney, so in marginal cases--when it appears the officer or agent has attempted to take advantage of the suspect's youth or mental shortcomings--lack of parental or legal advice could tip the balance against admission.

Not only did police "fail to call," Jerrell's parents, they specifically denied his several requests to do so. (51:30, 37). In ***State v. Farrell***, 145 N.H. 733, 766 A. 2d 1057, 1062 (2001), the court noted that "all courts that have applied [the totality of the circumstances] standard to a case in which a parent was deliberately excluded have suppressed the confession." ***Farrell*** cited ***State v. Presha***, 163 N.J. 304, 748 A. 2d 1108, 1119 (2000), in which the court held:

> [W]hen there has been a deliberate exclusion of a parent or legal guardian from the interrogation room and the police thereafter obtain the juvenile's confession, that confession almost invariably will be suppressed.

Id. at 1117.

That denial of Jerrell's requests for parental consultation is "strong evidence" of coercion, is confirmed by Detective Spano's explanation that after he had "worked all morning to get him [Jerrell] to tell the truth and be honest about what he did," that he did not want to lose "control" of the interrogation by allowing Jerrell to consult with his parents. (55:78-79). Spano's "control" of the interrogation is the antithesis of a free and voluntary choice to waive constitutional rights.

Finally, the timing of the request and denial of parental consultation in this case makes the effect of the denial even more coercive. In ***Miranda v. Arizona,*** 384 U.S. at 449-50, the court noted that psychological interrogation techniques require privacy, isolating the subject from family and other friends, preferably in unfamiliar police surroundings. The atmosphere, then, "suggests the invincibility of the forces of the law."

In this case, Jerrell was taken from his home at a very early hour in the morning and held incommunicado by police for more than six hours when he asked for his parents. Faced with the bleak reality of aggressive interrogation by detectives who summarily rejected his protestations of innocence, Jerrell sought help from the people children normally turn to for advice—his parents. When Detective Spano denied him that lifeline, police authority became even more overbearing and invincible. Under these circumstances, it is easy to see how Jerrell could conclude he had no choice but to comply with the demand of the officer who "controlled" him and compelled him to "tell the truth," as Detective Spano defined the truth.

3. Length of custody and interrogation.

The length of custody and interrogation are important factors in the "totality of the circumstances" analysis. The court wrote in ***Miranda, supra*** at 476:

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.

Jerrell was held incommunicado in police custody for more than eight hours before he signed his inculpatory statement at 2:40 p.m. After booking, he was left alone and handcuffed to the wall in the interrogation room for two hours. He was interrogated for 5 1/2 hours, with a 20-minute lunch break, before he signed the admission written by Detective Spano. (51:10-31).

The length of Jerrell's interrogation is similar to the five hours in ***Haley, supra***, and is much longer than most interrogations. In ***"Inside the Interrogation Room,"*** 86 J. Crim. L. & Criminology 266, 279 (1996) Richard A. Leo reported that 70% of the interrogations he observed in his study lasted less than an hour; only 8% lasted more than two hours. In ***Theriault***, the time from arrest until the conclusion of questioning was two hours and fifteen minutes. ***Id.,*** at 36-37. In ***Gallegos*** there was "no evidence of prolonged questioning;" he "immediately admitted" when he was picked up by police. ***Id.,*** at 54.

In ***Hardaway***, the boy was brought to the police station at 8:30 a.m. and briefly interviewed. By 10:30 a.m., he was given ***Miranda*** warnings and was questioned for about 15 minutes. He was then "left more or less alone for over five hours." At 4:30 p.m., he was told that another witness had implicated him, and he confessed—in an interrogation that took one hour. ***Id.***, at 766.

Given those facts, the ***Hardaway*** court concluded that the length of the questioning was not unduly coercive, saying "a total interrogation time prior to the initial confession of less than 90 minutes, presents a markedly different scenario from the five grueling hours of interrogation experienced in ***Haley*** [citation omitted]." On the other hand, the ***Hardaway*** court considered the time left alone in the interrogation room to be a strong indicator of coercion:

> One could still argue that leaving a juvenile alone in an interrogation room for eight hours

> creates enough psychological pressure to render the confession involuntary. Obviously, adolescents are less mature than adults and perhaps such a time lapse, which we would expect an adult to weather, would instead render involuntary the confession of a child, especially one deprive of any adult assistance.
>
> If we were a state appellate court, we might well find that on balance the psychological tension caused by leaving a boy of 14 alone in an interview room, hungry, scared, and tired, was enough to exclude the confession.

Id. at 766.

In ***A.M. v. Butler***, the 11-year-old suspect's confession was suppressed after "he was questioned for almost 2 hours in a closed interrogation room with no parent, guardian, lawyer, or anyone at his side." ***Id.*** at 797.

In ***Woods v. Clusen***, 794 F. 2d 293, 297-98 (7th Cir. 1986), the court described an interrogation of 16-year-old Woods, in which he was first interrogated by two experienced police officers for 15 to 20 minutes. Later, two different officers took over. The court wrote:

> While these officers were "fresh" Woods was already several hours into the ordeal. Without the presence of counsel one can only imagine what kind of convoluted thoughts were racing through Woods' mind at this point. The two new agents commenced what was to be a twenty to thirty minute interrogation . . . .
>
> Woods' confession ended the second interrogation after approximately one-half hour, yet one wonders how long the attempt to squeeze a confession from Woods could have lasted? Certainly, Woods must have wondered if and when the inquisition would ever cease.

The duration of his custody and interrogation, longer than in ***Haley***, and substantially longer than in

Woods, Theriault, Hardaway, A.M., and ***Gallegos***, clearly left Jerrell wondering "if and when the inquisition would ever cease."

4. Interrogation Tactics

"Detective Cassidy continually challenged [the accused minor's] statement and accused him of lying, a technique that could easily lead a young boy to 'confess' to anything," the court noted in ***A.M. v. Butler, supra*** at 800.

The psychologically coercive technique of repeatedly refusing to believe a suspect's denial of guilt, is described in ***Miranda, supra,*** at 450:

> To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. . . . These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

Not only did police refuse to believe Jerrell's repeated denials, but two officers joined in urging him to tell a different "truth" – doubling the authority in the small room. (55:85-86; 56:36). They demonstrated anger at Jerrell's stubborn denials, by walking out of the room without explanation, and by the lead interrogator raising his voice to make his "points." (51:30, 36; 55:83).

Additionally, they implied that an admission would lead to leniency, and suggested possible influence with the district attorney, telling Jerrell that an admission would look good "in the eyes of a judge down the road," and that they would call district attorney to explain his desire to be released from custody to finish the school

year. (55:47; 51:38). In ***In re D.B.X.,*** 638 N.W. 2d 449, 455-56 (Minn. 2002), the court sharply criticized police implications that confession was in a juvenile's "best interests," that they had influence with the district attorney, or that leniency would result.

Additionally, police admitted "numerous conversations," about Jerrell's future if he admitted. (52:11). Although the court found no promises or guarantees of a return home in this case, the ***D.B.X.*** court found that vague suggestions that the juvenile could return home after confessing were coercive. ***Id.*** at 456. The "conversations" in this case may have been similarly suggestive. One of the most common reasons for false confessions stated by teenagers who falsely confess is the belief that they would be able to go home if they admitted. Steven A. Drizin and Richard A. Leo, ***The Problem of False Confessions in the Post-DNA World,*** 82 N. C. Law Rev. 891, 906 (2004).

The use of these tactics was particularly egregious in ***D.B.X.,*** the court found "because of the variety and repetition of the tactics used," although the period of interrogation was short. ***Id.*** at 453, 456.

In this case, Jerrell was repeatedly, and for a prolonged period of time, subjected to these coercive psychological interrogation techniques, by two adult police officers. The tactics used by police, therefore, weigh in favor of finding that Jerrell's admission was involuntary.

5. Understanding of *Miranda* rights and prior police experience.

Jerrell, like most 14-year-olds, did not understand key concepts in the standard ***Miranda*** warnings. (54:63-67). The trial court's refusal to consider the testing of ***Miranda*** understanding by Dr. Kavanaugh was clearly erroneous. It based its ruling on Jerrell's credibility,

generally, and did not consider Dr. Kavanaugh's testimony that Jerrell's answers on the test were credible, because he believed that he did understand his ***Miranda*** rights. (58:62; 54:61).

Jerrell's deficits in understanding ***Miranda*** warnings are also credible because empirical research shows that only 20.9 percent of juveniles under age 15 understood all four of the standard ***Miranda*** warnings. Grisso, ***supra*** at 68 Cal. L. Rev. 1153.

Recognizing inherent differences in understanding of children and adults, the court in ***State v. Benoit,*** 290 A. 2d 295 (N.H. 1985), urged law enforcement to use a simplified juvenile rights form. See also Larry Holtz, ***Miranda in a Juvenile Setting: A Child's Right to Silence,*** 78 J. Crim. L. & Criminology 534 (1987), recommending a simplified warning and explanation by law enforcement.

In this case, police testified that they gave standard ***Miranda*** warnings with no additional explanation or discussion, in "just a few minutes." (51:28; 55:42). Although Jerrell said he understood, his statement of understanding is also typical of a child's reaction to authority figures:

> When faced with a coercive environment or show of authority, a child is more willing to do what it appears the authority figure would have them do. Taken together, these studies indicate that a child, unaccompanied by an adult advisor or a parent, would not only have trouble understanding the warnings as given, but might not be in a position to indicate to police that he does have such trouble. Simply put, a juvenile might say he understands a warning out of fear or out of a desire to please.

Robert E. McGuire, ***A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations,*** 53 Vanderbilt L. Rev. 1355, 1381-82 (2000).

The court of appeals erred when it concluded that Jerrell's two prior police contacts weighed in favor of finding his statement voluntary. Increased understanding of ***Miranda*** rights is only related to prior criminal experience, when the experience resulted in two or more prior felony referrals to court. Grisso, ***supra,*** at 68 Cal. L. Rev. 1159.

Jerrell had been previously arrested twice, for misdemeanor offenses. In both prior cases he answered police questions, admitted to involvement in the crime, then was allowed to go home. (54:61). In one case the charge was dismissed; in another he was placed in a First Offender (diversion) program.

In cases where the courts have found that prior criminal experience weighs in favor of a finding of voluntariness, the juvenile's contacts have been extensive. Hardaway had been arrested 19 times for crimes as serious as robbery and sexual assault and had appeared in juvenile court with appointed counsel seven times. ***Hardaway,*** 302 F. 3d at 767. Similarly, in ***Fare v. Michael C.,*** Michael C.'s record of previous offenses, his more than four years on probation, and his term in a youth corrections camp, were cited in support of the conclusion that he understood his ***Miranda*** rights. 442 U.S. at 710.

Even in light of the extensive experience of Hardaway and Michael C., the courts in both cases carefully considered understanding of ***Miranda*** rights. In ***Michael C.***, a transcript of the taped interrogation proved that officers "took care to ensure that respondent understood his rights." ***Id.*** at 726. Hardaway accurately explained his ***Miranda*** rights to the prosecuting attorney before making his admission. ***Supra,*** at 767.

Jerrell J.'s experience with police proves the wisdom of the adage, "a little knowledge is a dangerous thing." It taught him the opposite of the truth--admitting involvement in the offense would result in a return home.

Accordingly, Jerrell's limited "prior experience" factor in this case, weighs against a finding that Jerrell understood his ***Miranda*** warnings. Combined with the cursory recitation of the rights in this case, without explanation or verification of Jerrell's understanding, this factor weighs against a finding that Jerrell knowingly and voluntarily waived his constitutional rights when he signed the inculpatory statement.

6. Jerrell's other personal characteristics.

Courts have longed recognized that one of the reasons "special care" must be taken to scrutinize confessions by juveniles, is that they are much more subject to suggestion than adults. ***Gault,*** 387 U.S. at 54-55.

Jerrell was, like many juveniles, "highly suggestible and highly vulnerable to endorsing leading questions after he receives negative feedback." His answers to the Gudjonsson Suggestibility Scale, administered to him by Dr. Kavanaugh, placed him in the top five percent for suggestibility. (54:82-84).

The trial court's refusal to consider the results of the suggestibility test was erroneous. (58:62). Dr. Kavanaugh testified that the nature of Jerrell's responses showed that he was not trying to manipulate the test. (54:84). The Gudjonsson Scale is a "reliable and valid measure of an individual's suggestibility in an interrogative setting." Redlich & Goodman, ***"Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility,"*** Law and Human Behavior, 141, 145 (April, 2003).

Empirical research confirms the suggestibility of adolescents. In one recent study, participants were falsely told that they had touched a computer key that disabled the computer. When presented with false evidence of

their "guilt," 88 percent of the 15- and 16-year-olds admitted, compared to only 50 percent of young adults. Redlich and Goodman, ***supra,*** at 148. This result confirms the conclusion of a prior psychological study that juveniles are highly susceptible to adults' suggestions. Maggie Bruck & Stephen J. Ceci, ***"The Suggestibility of Children's Memory,"*** 50 Ann. Rev. Psychol. 419 (1999).

Jerrell's extremely high level of suggestibility, therefore, weighs in favor of a finding that he was unable to withstand police coercion to sign a statement of admission.

Jerrell's "low average" intelligence, also weighs against a finding that he knowingly and voluntarily waived his constitutional rights when he signed the admission. Dr. Kavanaugh testified that his full scale IQ score placed him in the "low average," range, and that the reliability of the test was supported by Jerrell's previous school records, as well as testing completed by Ethan Allen School. (54:54-59). The trial court's refusal to consider the results of the IQ test, and to instead rely upon its perception of his intelligence gained at trial, was clearly erroneous. (52:22-23; App. 105-06).

Jerrell's personal characteristics of high suggestibility and low average intelligence, combined with his age, 14, made him highly susceptible to police pressure, and weigh in favor of a finding that his decision to sign the admission was not knowingly and voluntarily made.

7. Totality of the circumstances.

Although each factor in the totality of the circumstances test is discussed separately, the cumulative effect of these factors must be considered:

> Any one of these facts, standing alone, might be insufficient. But that is not the test we

> apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

State v. Waldner, 206 Wis. 2d 51, 58, 556 N.W. 2d 681 (1996).

In ***Hoppe, supra***, the courts "did not identify a single act by the police that was egregious," but when "put together, the actions of the police and the personal characteristics of Hoppe indicate that Hoppe's statements were involuntary." ***Id.,*** ¶ 59.

When Jerrell's personal characteristics – his young age, his inexperience, his high suggestibility – are weighed against the totality of the pressures imposed by law enforcement – isolation, lengthy questioning, repeated assertion that he was lying and should tell the truth, raised voices, and refusal to allow him contact with his parents – there is no doubt that Jerrell's inculpatory statement was "not the product of a free and unconstrained will." ***Hoppe, supra*** at ¶ 36. Detective Spano said it best when he said that he had "maintain[ed] control" of Jerrell's interrogation. (55:80).

A comparison with other juvenile cases supports this conclusion. The following chart summarizes as accurately as is possible in a summary format, the totality of the circumstances in important federal and Wisconsin cases discussed in this brief.

Totality of Circumstances in Major Juvenile Confession Cases

	Fare-M.C.	**Theriault**	**Hardaway**	**Woods-Clusen**	**Gallegos**	**Haley**	**A.M.-Butler**	**Jerrell C.**
Age	16	17	14	16	14	15	11	14
Prior Experience	Consid-erable	---	Extensive, felonies	No serious	---	---	None	2 mis-demeanor
Education Intelligence	--	--	95 IQ	Grade 10 - Normal	---	--	5th grade	8th grade 84 IQ
Parent/Adult	None	He refused	Youth Officer	None	None	None	None	Requests denied
Interrogation Time	Brief	2 hours	<90 minutes	2 X 20-30 minutes	Not prolonged	5 hours	Almost 2 hours	5 ½ hours
In Custody Time	---	---	8 – 14 hours	---	5 days	---	---	8 hours
Police tactics	None	None	No coercion	Lies, 2 police teams	Not taken to court	Held days after	Didn't believe denials	Didn't believe denials, raised voice
Miranda	With care	Yes	3 times	Yes	Attorney	Silence only	Standard Version	Standard Version
Admissible?	Yes	Yes	Yes, with grave mis-givings	No	No	No	No	?

The ***Hardaway*** case, 302 F. 3d 757, deserves additional discussion because it involved a child the same age as Jerrell, but with higher intelligence and considerably more police experience.

The circumstances of the interrogation in Jerrell's case were significantly more coercive than in ***Hardaway.*** Whereas Jerrell was interrogated virtually non-stop for more than five hours, Hardaway was interrogated intermittently for a total of 90 minutes. Detectives in ***Hardaway*** did not repeatedly tell him he was lying, and did not raise their voices. Unlike Hardaway, Jerrell asked to call his parents and his request was denied. Hardaway was not handcuffed to the wall of the interrogation room, and Hardaway's ***Miranda*** warnings were careful and thorough, including his explanation back to the interrogators of what the warning meant.

The ***Hardaway*** court held:

> There is no doubt that Hardaway's youth, the lack of a friendly adult, and the duration of his interrogation are strong factors militating against the voluntariness of his confession; indeed, it seems to us that on balance, the confession of a 14-year-old obtained in those circumstances may be inherently involuntary.

Id. at 767.

Only because of the deferential standards of review under AEDPA, did the court feel "compelled to defer to the findings and the conclusion of the state courts." ***Id.*** at 768. "We do so, however, with the gravest misgivings and only in light of the stringent standard of review . . . because we are convinced that the many other indicia under Illinois law of the special care that must be exercised with children as young as 14 strongly suggests that an injustice was committed here." ***Id.*** at 759-60. In ***A.M. v. Butler, supra***, the Seventh Circuit did reverse the

adjudication of ***A.M.***, who was interrogated under similar circumstances.

Wisconsin case law reveals no cases factually similar to this case. Theriault conceded that his confession was voluntary, arguing only for a *per se* rule. ***Theriault, supra,*** at 38. In ***State v. Verhasselt***, 83 Wis. 2d 647, 266 N.W. 2d 342 (1978), Verhasselt was 17, the interrogation was for 90 minutes, and his parents were with him. Other cases involving 17-year-olds were based on similar facts. ***State v. Glotz***, 122 Wis. 2d 519, 362 N.W. 2d 179 (Ct. App. 1984); ***State v. Jones***, 192 Wis. 2d 78, 532 N.W. 2d 79 (1995). ***In Interest of Shawn B.N.***, 173 Wis. 2d 343, 497 N.W. 2d 141(Ct. App. 1992), involved a 13-year-old, but "he began talking about the incident" as soon as he got into a squad car. The officer "had to ask him to stop talking, be quiet and listen." ***Id.,*** at 364.

The totality of the circumstances analysis, and the comparison to other cases, shows that Jerrell's admission was coerced, and should not have been admitted into evidence.

II. THIS COURT SHOULD ADOPT A *PER SE* RULE, EXCLUDING IN-CUSTODY ADMISSIONS FROM ANY CHILD UNDER THE AGE OF 16, WHO HAS NOT BEEN GIVEN THE OPPORTUNITY TO CONSULT WITH A PARENT OR INTERESTED ADULT.

This court rejected a ***per se*** parent-consultation rule in ***Theriault, supra***. However, as the court of appeals noted, ***Theriault*** was decided 30 years ago "and the debate between the totality of the circumstances test versus a *per se* rule has been the focus of much recent attention." (Ct. App. Op., ¶ 28; App. 154).

Many scholars, commentators and courts have criticized the "totality" approach, pointing out that the lack of guidance as to the weight of each relevant factor, results in courts exercising "unfettered discretion." Barry C. Feld, ***Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court***, 69 Minn. L. Rev. 141, 173 (1984). "One major shortcoming of the totality of the circumstances test is that a judge can emphasize or downplay any factor she wishes." David T. Huang, ***Less Unequal Footing: State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation,*** 86 Cornell Law Rev. 437, 449 (2001). ***See also***, Thomas J. Von Wald, ***No Questions Asked! State v. Horse: A Proposition for a Per Se Rule When Interrogating Juveniles***, 48 S.D.L. Rev. 143, 162 (2003), ("Since there are no explicit rules on how a trial court must weigh the circumstances surrounding the confession, the child is basically treated in the same way as an adult").

Another criticism of the totality analysis is that only 20.9 percent of juveniles under age 15 understood all four of the standard ***Miranda*** warnings. Grisso, ***supra,*** 68 Cal. L.R. at 1153. "Without some aid to assist juveniles in comprehending their constitutional rights, the recitation of ***Miranda*** warnings threatens to be hollow and ritualistic." Huang, ***supra*** at 449.

Huang describes two more criticisms of the totality approach:

> From a more practical perspective, the totality of circumstances test creates uncertainty and speculation among law enforcement officials about whether a juvenile's statements may be admissible at trial.
>
> . . . . One astute commentator has observed that the totality approach "only protects the juvenile after he or she has confessed to the police; it does nothing to help the juvenile make the decision confronting him or her in the interrogation room."

Huang, ***supra*** at 449. (Citations omitted).

Finally, false confessions are "a leading cause of the wrongful convictions of the innocent in America." Drizin and Leo, ***supra,*** 82 N.C. Law Rev. at 906. Juveniles and the mentally retarded are most vulnerable to modern psychological interrogation techniques. ***Id.,*** at 919.

This case illustrates the dangers of the totality of the circumstances approach. Apparently unaware of this court's warning in ***Theriault, supra*** at 48, that police failure to call parents during juvenile interrogations "would be strong evidence that coercive tactics were used," the experienced detectives in this case testified that they "never" call a juvenile's parents. (55:32; 56:19).

Similarly, the trial court's decision indicated no knowledge of the ***Theriault*** decision. The court only briefly mentioned that police "did not permit any telephone calls to be made during the period of the interview, which I understand to be consistent with the policy of the Milwaukee Police Department," and gave that factor no weight in its analysis. (52:21; App. 105).

In determining the admissibility of co-defendant Jerrad's inculpatory statement, the trial court commented that Jerrad would be considered to be an adult for purposes of its totality analysis, indicating no knowledge of the "special care" required by ***Gault***. (50:115).

When the largest police department in the state allows its detectives to routinely refuse to call parents when their children are being interrogated, and a trial court gives that factor little weight in the totality of the circumstances, it is time for this court to consider a ***per se*** parental consultation rule. (Ct. App. Op., ¶¶ 28-32; App. 154-56).

Thirteen states have adopted, by case law or legislative action, some form of a ***per se*** parental consultation rule. In ***In Re B.M.B.***, 264 Kan. 417, 432, 955 P. 2d 1302 (1998), the court reviewed court-imposed "bright line" parental presence rules from Massachusetts, Missouri, New York, Pennsylvania, Louisiana, Vermont, Indiana, Georgia and Florida. It adopted such a rule, finding "the rationale in the above cases to be persuasive," adding:

> We are further persuaded by what occurred in the present case. For all intents and purposes, the State and the trial court treated B.M.B. as if he were an adult or at least a much older teenager. In viewing the record, it is clear that the trial court gave only lip service to the [totality] factors and ignored whether in fact B.M.B. comprehended his rights or his situation.

Id. at 432.

Evidence regarding the reduced capacity of juveniles to make decision, was instrumental to the Indiana Supreme Court's decision to impose a ***per se*** parental consultation rule in ***Lewis v. State,*** 259 Ind. 431, 437-438, 288 N.E. 2d 138 (1972):

> This State, like all the others, has recognized the fact that juveniles many times lack the capacity and responsibility to realize the full consequences of their actions. As a result of this recognition minors are unable to execute a binding contract, unable to convey real property, and unable to marry of their own free will. It would indeed be inconsistent and unjust to hold that one whom the State deems incapable of being able to marry, purchase alcoholic beverages, or even donate their own blood, should be compelled to stand on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to him and in an atmosphere most foreign and unfamiliar.

(Internal citations to Indiana statutes omitted).

Like Indiana, Wisconsin law requires parental consent for many important decisions by a child, for example, to obtain a driver's license, buy or lease a car, marry, or have an abortion. Wis. Stats. §§343.15, 218.0147, 765.02, 48.375. (Ct. App. Op., ¶ 29; App. 155). A juvenile's decision to waive fundamental Constitutional rights by admitting to a felony, is at least as consequential as driving, buying or leasing a car, and should be afforded the same protection.

For these reasons, Jerrell J. requests that this court reconsider the ***Theriault*** decision and adopt a ***per se*** rule excluding statements from children under age 16, who were not given an opportunity to consult with a parent, guardian, attorney or similarly interested independent adult, and the adult is informed and aware of the rights guaranteed to the individual. The court of appeals decision suggests the succinct, straightforward rule set forth in ***In re E.T.C.***, 141 Vt. 375, 379, 449 A. 2d 937 (1982), and Jerrell concurs in that recommendation:

> (1) he must be given the opportunity to consult with an adult; (2) that adult must be one who is not only genuinely interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and (3) the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile.

The court's adoption of a *per se* rule, as an exercise of his supervisory authority over the courts, would protect both the interests of the parent and child in consulting with one another about life-altering decisions. It would provide clear guidance to law enforcement officials, and it would provide courts with an unambiguous analytical framework to review the validity of juvenile waiver of rights during police interrogations.

III. THIS COURT SHOULD ADOPT A RULE EXCLUDING IN-CUSTODY ADMISSIONS RESULTING FROM JUVENILE INTERROGATIONS THAT WERE NOT ELECTRONICALLY RECORDED.

Another major flaw of the "totality of the circumstances" analysis is that court testimony cannot completely convey the totality of the circumstances.

> To fully consider the admissibility of juvenile confessions, courts must have a complete picture of what actually took place during the interrogation. The videotaping of custodial interrogations promises to ensure that a juvenile's rights are not violated. Videotaping interrogations will also assist the courts in framing an accurate picture of the circumstances surrounding a juvenile interrogation. Such a procedure has an added benefit in that it would largely eliminate frivolous claims of police misconduct.

Lawrence Schlam, ***Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?,*** 26 U. Tol. L. Rev. 901, 925 (1995).

In this case, the trial court remarked that it wished it had a videotape. (50:109, 113). Detective Spano and Jerrell gave conflicting testimony on many aspects of the interrogation, all of which were resolved in favor of police credibility. "In the absence of a tape recording, the prosecuting authorities invariably win the swearing contest." ***Harris v. State,*** 678 P. 2d 397, 414 (Alaska App. 1984).

Conflicts in evidence are often based on flaws in human memory – "people forget specific facts, or reconstruct and interpret past events differently." ***Stephan v. State,*** 711 P. 2d 1156, 1161 (Alaska, 1985). Recent research on the accuracy of interviewer's

recollections of interviews with children, confirms that memory errors are significant:

> [S]erious errors occur in recall of conversations and interviews with children. These errors are made by interviewers with various levels of training and also with various levels of familiarity with the child. The errors include the omission of details (forgetting), the commission of details (inserting facts that were not stated), as well as misreporting the degree to which the child's answers were spontaneous or the result of suggestive techniques.

Stephen J. Ceci, Maggie Bruck, ***Why Judges Must Insist on Electronically-Preserved Recordings of Child Interviews,*** Court Review, Spring, 2000, 8, 9.

Interviewer recollection research, Ceci and Bruck concluded, "probably underestimates memory errors in courtrooms" because witnesses must reconstruct interviews days, weeks or months later. Additionally, if the witness has interviewed other children, their reports may reflect confusion among cases.

Notes, diaries, and explicit warnings to remember all details of a planned interview, do not ensure accuracy. Therefore, Ceci and Bruck conclude, at page 9:

> The most significant message to be drawn from this work is that interviewers should be mandated to electronically preserve all . . . of their interviews with children. If courts are interested in historical accuracy, there is simply no substitute for a tape that can be played to verify the accuracy of the witness's recall and the details of the discussion that took place between the interviewer and the child.

The need for historical accuracy has led courts in Alaska and Minnesota to require that all custodial interrogations of suspects be recorded. In ***Stephan v. State, supra*** at 1159-60, the court held:

> Such [electronic] recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible. We reach this conclusion because we are convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial.

In addition to protecting a defendant's constitutional rights, the court held, electronic recording "also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics." ***Id.*** at 1161.

Finally, the court concluded:

> Another purpose is also served by the rule that we now adopt. The integrity of our judicial system is subject to question whenever a court rules on the admissibility of a questionable confession, based solely upon the court's acceptance of the testimony of an interested party, whether it be the interrogating officer or the defendant.

Id. at 1164.

In ***People v. Scales***, 518 N.W. 2d 587 (1994), the Minnesota Supreme Court exercised its "supervisory power to insure the fair administration of justice" to require electronic recording of all questioning "where feasible" and, without exception "when questioning occurs at a place of detention." ***Id.*** at 592.

A comparison of the description of Jerrell's interrogation with that discussed in this court's recent decision in ***State v. Hoppe, supra,*** reveals the value of electronic recording. In ***Hoppe,*** the audio tapes of the interrogation allowed the court to assess Hoppe's mental state based on his confusion about the date, conflicting statements about his whereabouts, difficulty following

instructions for a voice stress test, slurred voice, and long pauses. ***Id.***, ¶¶ 5-18. In reaching its conclusion about Hoppe's condition, the trial court explained that "one only needs to listen to the audiotapes to note the impairment referred to by the doctors." ***Id.***, ¶ 27.

These reasons have persuaded the American Bar Association to unanimously adopt a resolution urging legislatures and/or courts to enact laws or rules of procedure "requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or where videotaping is impractical, to require the audio taping of such custodial interrogations". (Resolution and Report at http://www.abanet.org/leadership/1004/recommendations/8a.pdf.

"[T]aping interrogations creates an objective comprehensive, and reviewable record of the interrogation . . . thus rendering the fact finding process more accurate and reliable." Drizin and Leo, ***supra*** at 82 N.C. L. Rev. 997. Given the ***In re Gault*** mandate to examine confessions by juveniles "with the greatest care," and the need for accurate and reliable information about the circumstances of the interrogation, this court should in the exercise of its judicial administration authority exclude inculpatory statements which result from in-custody juvenile interrogations that were not electronically recorded.

IV. JERRELL J.'S UNCORROBORATED, UNRELIABLE ADMISSION PROVIDED INSUFFICIENT EVIDENCE TO SUPPORT THE DELINQUENCY ADJUDICATION.

The trial court's adjudication of guilt is based entirely on Jerrell's confession. The court began its remarks by concluding that the state "relied almost entirely upon the confessions of the two juveniles who are

before the Court," and concluded that "their attempts to recant are not convincing. I am not convinced that these statements are not true. I think they are true. They are the guts of the State's case. Without them we are not here." (52:176-83).[5]

"It is a basic principle that conviction of a crime may not be grounded on the admissions of the accused alone." ***State v. Verhassalt***, 83 Wis. 2d at 661. This principle recognizes questions about reliability of confessions. Even if a confession is not "involuntary" within the meaning of the exclusionary rule, "still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation-whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past." ***Smith v. United States***, 348 U.S. 147, 153 (1954).

The principle prohibiting conviction based on admissions alone also protects the integrity of our system of justice: "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." ***Escobedo v. Illinois***, 378 U.S. 478, 488-489 (1964). "The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources." ***Id.,*** (internal citation omitted.)

When children are the subject of interrogation, the risk of false confession is increased: "authoritative opinion has case formidable doubt upon the reliability and

---

[5] The trial court used language suggesting that it relied in part upon co-defendant Jerrad's statement to determine Jerrell's guilt. However, in denying the postconviction motion, it stated that it had not. (58:52-54; App. 127-29).

trustworthiness of 'confessions' by children." ***In re Gault***, 387 U.S. at 52.

In a recent study of 125 proven false confessions, the authors reported:

> [C]onsistent with previous research, juveniles, defined as persons under the age of eighteen, are overrepresented in our sample of false confessions. . . . More than half of the juvenile false confessors in our sample are ages fifteen and under (22/40), suggesting that children of this age group may be especially vulnerable to the pressures of interrogation and the possibility of false confessions.

Drizin and Leo, ***supra***, 82 N.C. L. Rev. at 944. *See also,* Welsh S. White, ***False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions,*** 32 Harv. C.R.-C.L. Rev. 105, 131. ("Empirical data suggest that suspects who are especially vulnerable for other reasons such as youth, brain damage, or compliant personalities may be similarly prone to give false confessions . . . ").

The ***Gault*** court cited specific cases in which confessions were found untrustworthy, including one in which two boys, 13 and 15, confessed to a murder "with vivid detail and some inconsistencies." The boys had been interrogated for protracted periods, the parents of the boys were not allowed to see them, and inconsistencies appeared among their various statements and the objective evidence of the crime. ***Id.,*** 53-54.

Jerrell's admission bears all the indicia of an untrustworthiness described in ***Gault***. Jerrell was vulnerable because of his youth and high degree of suggestibility, he was isolated from his parents, he was detained and interrogated for prolonged periods of time, and coercive psychological interrogation tactics were used.

Moreover, the details in the statement Jerrell signed do not match the objective evidence of the crime. Witnesses, backed by the videotape, indicate "he" was wearing a knit ski mask, and Jerrad's statement said Jerrell had a mask. Jerrell's statement, on the other hand, describes wearing a dark t-shirt fashioned around his face like a mask. (49:57; 50:58, 139; 55:131; 52:29).

Jerrell is three to four years younger than the witnesses' youngest estimate. A witness who specifically noticed and mentioned "his" eyes described them as "light brown bright eyes," when in fact Jerrell's eyes are green. (50:54-58; 57:75).

Jerrell's description of his gun, *"with some orange tape around the barrel,"* more closely matches Detective Spano's description of markings on toy guns as *"an orange piece of tape around the tip of the barrel,"* than it does the witness's description, *"the inside of the barrel was red."* (52:29; 55:126; 50:54).

Jerrell's statement does not match his co-defendant, Jerrad's admission in significant details. Jerrad said the robbers used the white and blue car of a third suspect, Roscoe, to get to and from the McDonald's. (50:139). Jerrell's statement says a person named "Melvin" was their getaway driver, and they used Melvin's "gray four door mid-size American model car." (52:28).

Jerrad's statement says he and Jerrell each received $800 of the proceeds. (50:140). Jerrell's statement says the money was not divided among the robbers, but he talked his brother into giving him $100, with which he bought shoes and a baseball cap. (52:31).

Jerrad's statement says they burned the ski masks and two plastic guns in a grill behind Roscoe's house. (50:141). Jerrell's statement says they put the masks and guns into the trunk of Melvin's car. (52:31).

Not one piece of physical evidence corroborates Jerrell's statement. Police did not find any masks, guns, shoes, or baseball cap. They did not find Melvin or Melvin's car. (52:145; 55:124-25). Not one witness identified Jerrell as one of the robbers.

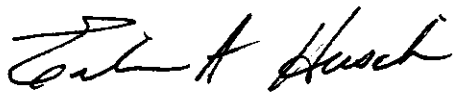
Under the circumstances of this case, therefore, Jerrell's admission is not corroborated by a "significant fact," and it is, standing alone, insufficient evidence to prove beyond a reasonable doubt that he was a party to the crime of armed robbery.

CONCLUSION

Jerrell J. respectfully requests that this court vacate his delinquency adjudication, and suppress the inculpatory statement on which the adjudication was based. He further requests that the court establish, through its administrative authority, the *per se* rules described in his brief.

Dated this 5th day of May, 2004.

Respectfully submitted,



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Attorney for Respondent-Appellant-Petitioner

APPENDIX

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STATE OF WISCONSIN | CIRCUIT COURT CHILDREN'S DIVISION | MILWAUKEE COUNTY

Case No. 01JV001168

DISPOSITIONAL ORDER
CHILD ADJUDGED DELINQUENT

* *

In the interest of **JERRELL C. J[redacted]** D.O.B. **07-29-1986**
a person under the age of 18.

* *

FINDINGS AND JUDGMENT: The above entitled matter having been heard by this Court on the 6TH day of JULY, 2001.

APPEARANCES: ADA: Steve Licata; JUVENILE: Jerrell J[redacted]; JUVENILE'S ATTY.: Briget Boyle; Parents: Julia J[redacted] and Todd S[redacted]; Grandmother: Sandra S[redacted]; PO: Diane Bates; V/W: Ruth Winters with Tabitha Wnuczek, Lela Hoover and James Rusch

THE COURT FINDS THAT: The juvenile has been found to be delinquent for the commission of **ARMED ROBBERY, PARTY TO A CRIME** contrary to Wisconsin Stats. Sec. **943.32(1)(B) & (2) AND 939.05**, an act which if committed by an adult would be punishable by a sentence of six months or more. The juvenile's current residence will not safeguard the welfare of the juvenile nor the community due to the serious nature of the act for which the juvenile is adjudicated delinquent. The juvenile is found to be a danger to the public and in need of restrictive custodial treatment. A less restrictive alternative than placement in a secured correctional facility is not appropriate. The criteria for Serious Juvenile Offender Program have been met and the only other appropriate disposition would be placement in a secured correctional facility.

* *

THEREFORE, THE COURT ORDERS: PURSUANT TO WIS. STATS. s. 938.34 (4h), THE JUVENILE PLACED IN THE SERIOUS JUVENILE OFFENDER PROGRAM OF THE WISCONSIN DEPARTMENT OF CORRECTIONS SECURED CORRECTIONAL FACILITY AT ETHAN ALLEN SCHOOL AT WALES, WISCONSIN FOR A PERIOD OF FIVE YEARS UNTIL FIVE (5) YEAR.

Other: **Restitution in the amount of $3,590.00 to be paid jointly and severally; Release of names and Juvenile to pay a $20.00 victim/witness surcharge.**

No new child support order issued at this time.

* *

Agency Primarily Responsible for Services: DEPARTMENT OF CORRECTIONS

Date order expires: JULY 6TH, 2006

BY THE COURT
Dated: July 6, 2001

F. T. Wasielewski

Francis T. Wasielewski
Circuit Court Branch 17

Circuit Court of Milwaukee Co.
FILED
JUL - 6 2001
CHILDREN'S DIVISION
JOHN BARRETT

CC CC

STATE OF WISCONSIN
MILWAUKEE COUNTY CIRCUIT COURT
JUVENILE DIVISION

In the Interest of Jerrell J[redacted] (d.o.b. 7-29-86) A Person Under the Age of 17	ORDER OF THE COURT DENYING POST-DISPOSITION MOTION OF JUVENILE JONES Case No. 01-JV-1168

The above-noted case having been brought on for final hearing before the Court on December 13, 2002, THE COURT HEREBY ORDERS THAT ALL OF THE POST-DISPOSITION MOTIONS AND CLAIMS FILED WITH THE COURT BY JUVENILE JERRELL J[redacted] AND HIS COUNSEL ATTORNEY EILEEN HIRSCH pertaining to the May 29, 2001 Armed Robbery delinquency petition, the Court's June 29, 2001 guilty verdict and the Court's June 29, 2001 order finding juvenile [redacted] delinquent of said Armed Robbery ARE DENIED BY THE COURT.

This order denying juvenile J[redacted]' request for Post-Disposition relief is made by the Court based on all of the records and proceedings heretofore taken in this case including post-disposition evidentiary hearings, argument by the parties and written submissions by the parties.

The Court's reasons for this order denying juvenile J[redacted]' Post-Disposition Motions have been set for forth by the Court on the record at the December 13, 2002 hearing in this case.

ORDERED BY THE COURT, THIS 16th DAY OF DECEMBER, 2002.

F. T. Wasielewski

Honorable Francis T. Wasielewski
Branch 17
Milwaukee County Circuit Court

and the young age of Jerrell J[redacted] and what he was feeling as he was in the interview room.

MR. LICATA: No rebuttal.

THE COURT: All right. This motion is focused on a single point here and that is the element of coercion. It certainly is agreed, of course, that a statement that is received as a result of improper coercion is not admissible as being violative of a person's Fifth Amendment rights and potentially Sixth Amendment rights. As I noted yesterday in dealing with Jerrad's motion, there is an element of psychological coercion that is inherent in a custodial interview inherent in the process. Case law recognizes this in 37 Wis. 2nd, State v. Le Fernier, 365. Also the United States Supreme Court recognized it in Culombe v. Connecticut, 367 U.S. 568.

The question here is whether, in the totality of circumstances, whether Jerrell was coerced into making the statement that he made to Detective Spano. In deciding that question I think the Court has to get to the credibility issue that was identified here by both counsel and argued, and that is whether or not a promise

was made by Detective Spano or Detective Sutter that Jerrell could go home after a night in detention if he made an admission.

Again, both detectives who were involved here in this interview, this interrogation, are experienced police officers. I think they both testified to having more than 20 years experience in police work and both had been detectives for a long period of time. As detectives they are certainly experienced at interviewing suspects in the course of investigating serious felony matters.

Applying the factors that this court has to consider in weighing credibility, I think a big factor here is the one that goes to the interest or lack of interest of the witness in the result of the hearing or trial. Certainly Jerrell has something at stake here. If this statement is admitted, it is a statement that is one that is against his penal interest. That interest is something that, the keeping the statement out, is something that the Court can properly consider in weighing his credibility.

Again, I agree with Mr. Licata here. I don't think there was any shading of testimony

here by these police officers. They did indicate that they did not permit any telephone calls to be made during the period of the interview, which I understand to be consistent with the policy of the Milwaukee Police Department in these situations.

The interview lasted from 9 a.m. until 2:40 p.m. with perhaps five to seven, maybe as many as eight interruptions when Detective Spano, who really took the lead in questioning Jerrell, was out of the room either to confer with others in the police department, make telephone calls, answer telephone calls or for whatever reason he was out of the room so there were interruptions.

Additionally, there was a 20 minute lunch break during which time Jerrell had a couple cheeseburgers and some stale french fries. Additionally, Jerrell had requests for food during the course of the morning of a couple candy bars and a couple Pepsis. Those requests were honored. He received those things to eat and those also I suppose were breaks of a sort while he consumed those. There were bathroom breaks, too, over the course of this slightly in excess of five and a half hours. I think also

it is necessary, as we did yesterday, to examine some of the personal characteristics here of Jerrell.

Jerrell indicated that he was I believe in the ninth grade.

DEFENDANT JERRELL J[redacted]: Eighth.

MS. BOYLE: Judge, I don't think he actually testified to that.

THE COURT: Maybe he didn't testify as to a grade. I am a little fuzzy on that. But it will be, to the extent the Court can rely on it, necessary in examining Jerrell's personal characteristics. It is in page 1 of that document that is in evidence.

MS. BOYLE: He testified that he is going to be 15 in July.

THE COURT: Yes. The date of birth is July 29th of '86. His birthday is July 29th. He will be 15 then.

MR. LICATA: But it is in evidence on page 1, the pedigree sheet, it says eighth grade, Silver Spring Neighborhood Academy.

THE COURT: All right. There is nothing in the record to contradict his statement that he is a good student. He has a 3.6 average. That

certainly would indicate, without an I.Q. rating, his intelligence would be in the higher range. There are not many people running around with 3.6 averages. That is an excellent scholastic mark. He seemed to understand when he testified, from the Court's observations, understand the questions that were put to him. He appeared to be articulate. He was able to give articulate answers. He was able to draw distinctions which would be consistent with the high degree of intelligence that he exhibits with respect to his grades, his studies.

He doesn't appear to be in, either now or at the time of his interview, in any distraught, emotional state. There is no evidence of any mental disease or defect or any type of psychological malfunctioning.

He had some prior experience with the police. He had been arrested on two occasions for offenses that would, in the criminal code, be misdemeanors.

There was no evidence here of any altered state on his part through the use of alcohol or drugs. He is 14 years old. I would not expect there would be. That is not in the record. I

find that there was none at the time of the interview. He was not in any physical pain or any injury apparent.

He also indicated that he never did, -- During the course of the interview he said I think something to effect the thought crossed his mind that when Detective Spano would raise his voice, the thought crossed his mind that it was leading to some sort of a physical -- that he was about to be struck or somehow physically manhandled or mishandled. However, he said while that thought crossed his mind, he never felt physically threatened. He said that that thought may have occurred to him, but he dismissed it. He didn't think he was in physical danger. He didn't perceive himself to be in physical danger while he was with the officers in this interview room.

So that considering these, considering also the Court's view on the credibility issues here, I don't think there was any improper coercion applied on Jerrell to obtain the statement that was obtained here and so that the Court would allow the statement made by Jerrell to Detectives Sutter and Spano to be admitted into

the record here. I find this by a preponderance of the evidence, which is the applicable standard here.

Let's just take a three minute recess.

(Brief recess.)

MR. LICATA: Something I should have asked, which you already found as a finder of fact, is that there was no evidence that he was drinking or under any intoxicating drug that could have altered his state. I would like the record to reflect the document before the Court does also support that Court's finding. Page 1, "the pedigree," concludes saying that he does not drink alcohol or use any illegal substance and stated he was not on any medication and that is also in the record affirmatively. I should have brought that out.

THE COURT: All right.

MR. LICATA: We are ready to proceed with Detective Spano again.

MS. BOYLE: I know Mr. Licata is going to put Detective Spano on to read the statement. I asked him if we could stipulate. Maybe if the Judge just reads it, you can then ask those other questions that you wanted to ask of him.

Finally, Randall J[redacted], as they had argued, maybe he was that third person. You saw him in court. He is not the light skinned, bright eyed robber that Kenya Davis saw. We didn't argue that Randall J[redacted] was a third guy. I am saying, in case the Court might think maybe Randall and not Jerrell J[redacted], I am saying Jerrell J[redacted] is the light skinned, bright eyed robber. The pieces are consistent and they fit together. That is proof beyond a reasonable doubt. That is all I have to say.

Thank you.

D E C I S I O N

THE COURT: I would like to congratulate counsel for a case that has been well presented. I would like to thank them for their forbearance with me over the past four days and in effect making themselves to suit my schedules and sometimes telling them I would be ready to go at a certain time and I wasn't ready and I kept you all waiting for sometimes an hour or more at a time because of the schedule out here at Children's Court. This case was made more difficult for the Court and certainly for counsel by the fact that we had to truncate it

and squeeze it in in blocks of time. I dare say, if we could have started on Tuesday morning instead of late Tuesday in the afternoon and started the trial of this case, this probably could have been done in two, two and a half days; instead we are here over a period of four days. The case has been well presented, well argued.

I find beyond a reasonable doubt that in the early morning hours on May 26th of 2001 at the McDonald's store at 74th and Appleton that an armed masked robbery did occur and that three persons entered that store with intent to steal. They took $3,590 from the owner, from Tabetha Wnuczek, by threatening imminent use of force against her person. I think it is clear that the robbery occurred. The question in this case is who did it? That's the question.

The State has relied almost entirely upon the confessions of the two juveniles who are before the Court here: Jerrell and Jerrad. Those confessions, those statements they made, were admitted after a Miranda-Goodchild hearing. The defense here has been one largely of saying what we said was not true in the case of

Jerrell. Jerrad's is a little more complex because his initial statement is a denial. It's a pretty clear denial. Later he makes a change and makes a statement in which he admits involvement and implicates Jerrell and Roscoe. Jerrell implicates, in admitting in his statement, admits his involvement and implicates Jerrad, Roscoe and Anthony H[redacted] as the inside man who let everybody in. Both statements are rich in detail; the kind of detail which lends credibility to the statements.

To defend against these statements there has been rather a tangled web that has had to be woven here to do it. Some of it is evasion. Some of it is inconsistency. Some of the inconsistencies are small inconsistencies, but, you know, I believe certainly we will understand what is going on here. Both statements implicate Roscoe and subject him to potentially serious criminal liability. Jerrell's statement additionally implicates Anthony H[redacted]. Anthony, Jerrad, Jerrell, and Roscoe are all family.

I think that perhaps the motivation for the tact that the defense has taken has been

certainly motivated in some substantial part by the notion that you don't want, by your actions, to implicate family members and thereby subject them to serious criminal liability as adults in the adult penal system. Armed robbery is a 60 year offense. If you are masked, that adds more time. So that by taking the position that they take, it has been an attempt not only to protect themselves and perhaps insulate themselves from any responsibility or liability in the juvenile system, but by also doing that they are protecting their family members from liability in the adult criminal system. I think that type of motivation is at work in this case.

Details in both statements like the orange gun barrel squares with the testimony of an independent witness, Kenya Davis, who was at the store and who noticed that barrel and was in a position where she had to look down the barrel of that gun. She thought it was a real gun and she was not going to be so foolhardy as to challenge the person holding that gun.

The amount of money taken in one statement is $3,500 and one is $3,600. I think the actual count was $3,590. There was an accounting done

that very evening after the robbery occurred. $3,590 was found to have been taken. Both statements bear out that amount. Jerrad even describes in his statement how the money was divided. Anthony H[redacted] was going to get $800. He got arrested that night. Jerrell got $800. Jerrad was going to get $800. The balance was going to go to Roscoe. That's not the kind of detail that a police officer would plug into a statement. As I say, these statements are rich in detail and that is a salient detail.

Jerrad goes on to describe how they burned the ski masks and the two plastic guns in a grill behind Roscoe's house. Again, that's not something that a police officer can come up with. They are saying the police officers supplied all of these details. That's another example of how these statements are rich in detail.

Also there is some interesting coincidences. Jerrad had $699 in cash when he went down to the Criminal Justice Facility on Sunday evening at about 8 p.m. to bail out his brother Anthony. He said at one point that I like just carrying large amounts of money and

this is money I made working at the sub shop. That is over 10 weeks pay. That's assuming he put aside every penny. At $130 every two weeks, it would take him 10 weeks to accumulate $650 saving every single penny he made. He still wouldn't be there. He would still be $49 bucks short. It's just a detail that fits, but it's a significant detail.

Another one is the fact that Roscoe goes out the very next day and purchases a car the day after the robbery occurred.

I think the alibi witnesses that were offered had the same realization that the juveniles had in this case regarding the precarious positions of both Jerrad and Jerrell and Anthony H[redacted] and Roscoe H[redacted]. Todd S[redacted] is sure he arrived at home on Friday night between 12:20 and 12:25. He's not so sure what happened the next night, though, Saturday night, the working at the Pfister Hotel, whether that was Sunday night. He is very sure of one detail but unsure of other details around the same time. I didn't find his testimony convincing.

Likewise mom, Julia J[redacted]. I have it in my notes. In her testimony she gave four different

times as to when she arrived home on the evening of May 25th. In this record there are four different times. She told Detective Becker she arrived home at 10. Some of these are pretty close so that they are substantially similar. Then she told Attorney Boyle she arrived home between 10 and 10:30. She told Attorney Kaiser she arrived home between 10:30 and 11. She told Assistant District Attorney Licata that she saw a clock in the tow truck and she arrived home at 10:55.

Generally there is a rule of thumb that the statement a witness makes that is closest in time to the events perceived, which are the subject of the statement, that statement is likely to be the most accurate because that is the one that is closest in time when the memory is most fresh. I also don't find mom's testimony convincing.

I couldn't agree more with Attorney Boyle's assessment, though, that if we had Officer Westergard coming in here and saying that this Field Investigation was conducted an hour and a half earlier at about 20 minutes to 1, I don't think we would be here. We would not be here.

So that the attempt here is to discredit their own confessions by saying the officer supplied the facts or the officers didn't take down what we said. I think one statement was to the effect half of it was stuff I heard from somebody else and half of it was stuff the officer supplied to me. It all masks the simple fact that these are statements against interest.

These two boys are both intelligent. I think they are both smart. They are boys so they are still naive in many ways, but I think both have more than a mere glimmer of recognition of the fact of the precariousness of their positions because of these statements they made and also the positions of their close family members. It's a tough job to try to discredit your own statement and take it back, recant.

The statements were found already, after the Miranda-Goodchild hearings, to have been statements to which both of these juveniles were properly advised in the circumstances and statements that were voluntarily made. They are intelligent young men, articulate young men. I thought they both handled themselves well on the

witness stand in giving their testimony, but their attempts to recant are not convincing. I am not convinced that these statements are not true. I think they are true. They are the guts of the State's case. Without them we are not here.

The State has shown beyond a reasonable doubt that the two juveiles who are before the Court were involved in the subject armed robbery, which is in the petitions, and this has been proven to this Court's satisfaction beyond a reasonable doubt and as to each I am going to order entry of a finding of delinquency.

I will order that these cases be set down for disposition. I, of course, want a court report on these cases. I want to know a little bit about the boys and their families so that for purposes of disposition I can make a disposition.

It is perhaps truly fortunate that both of you are in the juvenile justice system and not the adult justice system.

MADAM CLERK: July 6th, 11 o'clock, disposition.

MR. LICATA: Judge, the State obviously is

Thank you.

JUDGE WASIELEWSKI: Okay. Thank you. Going to take a two-minute bathroom break.

(Whereupon, a brief recess.)

JUDGE WASIELEWSKI: Please be seated. Thank you.

(Discussion off the record.)

JUDGE WASIELEWSKI: All right.

The custodial statements that were made by the juveniles in this case, were at-- were central to the proscecution. And I think I'd like to begin-- They also, I think, consumed all the time in argument this morning. And I think I'd like to begin with the issues involving those statements.

The totality of the circumstances test applies in Court determinations in a Goodchild hearing as to the voluntariness of a juvenile's statement.

And the case that-- The central case on that in Wisconsin is the Therio case, which has been cited, and also has "care" in it. From Galt, the greatest care language, which has also been referred to. 66 Wisconsin Second, Page 33, is Therio.

At Page 39, the Court cites extensively from Galt. And I'd just like to read part of it here, that I think has probably been central to the discussions involved in

this case. "The greatest care must be taken to assure that the admission was voluntary in the sense not only that it wasn't coerced or suggested, but also not the product of fantasy or despair."

The totality of the circumstances test was applied in this case and this Court's consideration of the evidence in the Goodchild motion.

And the evidence presented in that motion, the element of coercion there, was the statement made by Detective Spano as to whether Jerrell would be-- if he made a statement, would simply have one night in Detention and then he'd be free to go home. And that was Jerrell's testimony, as to what he was told.

Detective Spano testified something to the effect that Jerrell would be taken to the Detention Center and he would spend a night in Detention; and after that, Detective Spano was not-- did not have any control over what would happen. Jerrell would be in the System. And the question of whether he would be detained or released, would be in the hands of others.

The Court accepted Detective Spano's testimony on that at the original hearing. And-- And that certainly played a salient part in the decision that was made, the decision on that issue.

The record does here indicate that Jerrell made

requests to call home. And, from the evidence that's been received, it appears that those requests were made in the afternoon, after he had admitted, but before a statement had been completed.

Well, I have to back up a little bit. Back up for a minute here, to the language in Galt that I just cited.

As far as Jerrell's ignorance of his rights, the indication was, at trial, that there was a stipulation that he had been advised-- he received his Miranda warnings and that he understood his Miranda warnings. And, based on that agreement, there was not any testimony taken on-- on the Miranda portion. Nor were any findings necessary, because there was an agreement on that point. And in the record here, as part of Exhibit 12, and also in testimony on June 29th, in the transcript, the second part, Page 27, that Jerrell was advised of his rights, he understood them.

So I-- Based on the evidence this Court heard at the time of this trial, the findings I made about Jerrell, were already mentioned by Mr. Licata.

He had a 3.66 average. He was in 8th grade at Silverspring School. He answered questions appropriately. He made-- was able to make distinctions. He seemed well-- He handled himself well during that trial. He's 14 years old. Almost 15. Couple months shy of his 15th birthday.

So I-- You know, was there adolescent fantasy here on his part? I don't think so.

Was he frightened? He said he never felt physically threatened. The raised voice at first made him-- thought maybe he was going to get manhandled or struck. But he did not-- That thought passed through his mind, but he did not dwell on it and he was not afraid. That was his testimony. And that finding by the Court was referred to here this morning.

He had interruption for bathroom breaks. That was also found. That's in the record.

He had food requests for candy bars and Pepsi's.

There were also interruptions taken while Officer-- or Detective Spano left the room to make telephone calls or return telephone calls or confer with others. Probably were five to seven of those.

He also had a lunch break where he had some cheeseburgers and Frenchfries.

And his demeanor was at one point described as-- by reference in the record here, by Mr. Licata, as bored.

MS. HIRSCH: Your Honor? I was-- I apologize for interrupting. But I do want to point out,-- And Mr. Licata said-- I didn't have a chance to say to you, the part he read to you was after the Detectives were-- had left the room, and he was writing the pictures

afterwards.

It's a factual issue.

But that "bored" thing was after the interrogation concluded and he was left alone in the room.

JUDGE WASIELEWSKI: All right. All right.

I don't think that materially would change things. I think if he had been coerced and was feeling some fear or some intimidation, I don't think he would suddenly go from feeling fearful, fretful and intimidated, to being bored. I mean, that doesn't square with this Court's experience in situations like that.

If your body senses are heightened to the extent that you are put in a fearful, apprehensive state, you're going to remain in that state for some time and it's going to take you a while to calm down. You won't immediately-- That fear emotion is not something that you can turn on and off like-- you know, like a water faucet. Once you got that turned on, it takes some talking to.

Just like a child who wakes up in the night crying because they're fearful. You know. You got to talk to that child, console that child, and bring them down.

I don't think you go from fear-- a feeling of fear, apprehensiveness that would be attendant in coercive circumstances, to a feeling of boredom. I mean, that--

that, to me, is a-- is a non sequitur. Even though the boredom is recorded, as you say, as being at the end of the interview.

And that's-- That's not my experience with-- with people or with children. Especially with children.

So the fact that he felt bored, is an indication that he was not apprehensive, fearful, fretful while he was being questioned. And, even though the record indicates that that feeling of boredom is described at a point after the questioning had ended.

MR. LICATA: Judge, but I would point out, he still had-- It's in his statement, it's in his Exhibit. It's where he drew the diagram. And it's right below, he wrote "I'm sorry. I made sure nobody was hurt."

He still had his statement in front of him, when he was doodling and writing. It was at that point in time.

JUDGE WASIELEWSKI: All right.

MR. LICATA: I'm sorry for interrupting.

JUDGE WASIELEWSKI: All right.

So that, you know, considering the-- Well, first of all, the request to call parents, was denied. That's clear.

It was denied on two or three occasions. And it was denied at a point after he had made an admission and the questioning was proceeding.

Taken in the context with the other circumstances that were attendant at the time, I don't think the denial of the request to call home, made this-- made this interview, made this questioning, this interrogation, coercive.

The real question is, was the-- And the-- Rielly talks about this, the Seventh Circuit Decision, --is the request to call parents, a request for an attorney or a request to remain silent. And that's the thing, I think, where great care is required, to determine whether the call for the parents is really the call for an attorney. And I don't-- I don't see evidence here that it was either of those.

Jerrell never asked for an attorney. He never asked to-- never asked, in the questioning, "I want to stop this, this is over, I'm not going to say any more." No indication of that anywhere.

So that the fact that he was not permitted to call his parents, does not make this interro-- is not, without more,-- does not make this interrogation coercive in the circumstances.

And I think that is a holding of the Therio case, too.

Some states have it. And I know some of those cases are cited in the Therio case. The Court-- They're considered, both sides of the coin, in adopting a rule for

Wisconsin. That any requests for parents must be honored and the questioning must stop until the parents arrive. And then things resume from there.

Indiana was mentioned as one of the states that had that rule, at the time the Supreme Court decided Therio.

So that I don't find here-- Well, I guess I'm affirming the decision that was made here, and adopting the findings that were made by the Court at the time. And I believe I did exercise great care.

I try to be careful in every decision I make. And I believe I was careful in this case, in considering the circumstances surrounding Jerrell's questioning and his interrogation by Detect ive Spano. And I don't see a reason in these circumstances to change it.

I'd like to move now to the question of the co-Defendants and their statements and the use of their statements.

The confessions of Jerrell and Jerrad were both received at trial after Miranda-Goodchild hearings. And those statements did, in addition to the juvenile making a self-implication, also implicated others. And Jerrell did implicate Jerrad as being involved. Jerrad did indicate Jerrell was involved, in his statement.

So there's a potential Bruten (Phonetic) problem

here. And the problem being, you know, that there's not an adequate opportunity-- And, the person making the statement, when they're a party defendant, has a Fifth Amendment right not to testify. And the other Defendant has a Sixth Amendment right to confront his accuser. And you want to avoid that situation occuming at trial.

And there was-- I think in anticipation of that potential problem, there was an agreement made.

And it's fine if you know that the Defendants are going to testify. And then, you know, the attorneys can say, "Okay, we'll have at it". You know. But that apparently was not known here. Although it's interesting to note, both Defendant-- both Juveniles did testify. And not just in their Miranda-Goodchild, but also in their cases, as part of the defense.

But there was, none**theless**, an agreement made that there would be no references made by anyone to the-- The statements would only be used for the purpose of self-incrimination, not in the incrimination of anyone else named in the statements. I think that's the gist of what was agreed to.

So that Jerrad's statement could not be used to implicate Jerrell. Jerrell's statement, could not be used to implicate Jerrad.

The Court did examine the statements at the close of

trial.

And perhaps with the benefit of hindsight here, I would have been better to make separate findings for Jerrell and separate findings for Jerrad. And then this all would have been compartmentalized, and we wouldn't be here talking about this issue.

But this Court's purpose in looking at the statements and looking at them-- Well, I looked at them for consistency and-- with each other, and with the body of evidence that was introduced at trial, wanting to determine, you know, if there was something grossly out of line, you know, what-- That might affect the weight that ought to be given to them.

I think that type of an evaluative process is appropriate. And I think it's consistent with the stipulation that was made by the parties in this case.

And this Court didn't at any time rely on Jerrad's statement implicating Jerrell as a part of the evidence that was used to find Jerrell delinquent on this petition. And the Court accepted the stipulation that the parties made. And I believe I followed it.

Nor did I give any type of subjective consideration to Jerrad's statement against Jerrell, or Jerrell's statement against Jerrad. But, as I say, separate findings for the two Defendants, which would have

compartmentalized all of this, I think, would have made for a clearer record. And that's my fault.

There has been a lot of talk about whether inconsistencies-- what inconsistencies there are between the-- Jerrell's statement and other evidence in the case.

Two things the State has relied on is the red-slash-orange gun which was-- which is in Jerrell's statement and also in the testimony of Kenya Davis. Although she says it's red. Jerrell identifies it as orange.

As I say, on the spectrum of colors, red and orange are right next to each other. And I think to what-- to one person, what might be red, could, to another, be called orange, and you could have a legitimate disagreement on that.

So that I don't think that is any type of a material inconsistency.

And I don't think, as has been suggested here in argument this morning, that there's-- that the fact that-- or, Jerrell says he had a black toy pistol with some orange type around the barrel,--

MS. HIRSCH: "Tape".

JUDGE WASIELEWSKI: Those were his words. I had the word "type". Maybe it was a typo. "Orange tape", okay. It would have to be "tape". And I don't think that statement by Jerrell, was

something suggested to him by anybody, as has been argued here this morning.

It's an interesting theory. But, without more,-- These officers were experienced. And they talked, I think,-- I don't know if it was at trial or in the post-trial testimony, about how they conduct these interviews. And, they've done hundreds of them. And many of them with juveniles.

And Detective Spano was a credible witness, in this Court's view. Did he have his approaches to interviews? Yes, he did. Although I guess he didn't read the same book that defense counsel did with regard to how he conducts them. I know there was not much, that he said he used in some of the question, although he does-- He says he does-- Over the period of time, you do-- you develop your own techniques, you do what works for you.

I think it's probably akin to the techniques that lawyers develop, trial lawyers develop, in questioning witnesses in trials and in depositions. And you start out reading the text books or the--going to the seminars where somebody tells you "This is how to examine a hostile witness". And some of those things may work some of the time. But after a while, what it comes down to is your own seasoning, your own experience. And a lot of it is, you know, your ability to gauge people and how, as a

lawyer you ask a question to somebody, to get-- try to get the information that you're seeking.

And I know it becomes more difficult when the witness is a hostile witness and doesn't want to tell you anything. But, you know, experienced lawyers have techniques for doing that. And I think-- I think much the same skills are involved with a detective asking a witness questions. They have their own ways and techniques of doing that.

Another area of inconsistency that was pointed to was in his statement, Jerrell talked about wearing a mask fashioned from a dark T-shirt, whereas the other witnesses talked about a ski mask.

Whatever it was that Jerrell had on his head, was described as having only one opening.

And I would think, as a choice of ski masks, you know, the kind that was described by defense counsel, would be one that wouldn't cover much of your features. And that wouldn't be the kind of-- You know, might even be a nice legal question there, whether your face was masked, in terms of five-year enhancers, because your mouth, eyes, nose,--eyes, your cheeks, face, would all be visible. And if you are-- You know, the purpose of being masked, is to avoid being identified. And I--

But, on the other hand, if you don't have a ski

mask, all you have is a T-shirt, and you put that over your head, and you fashion it-- you wrap it around your head in such a fashion, there's only going to be one opening.

And the testimony here in this record is that the T-shirt was black, the ski masks were black. I don't think it's-- it strains credulity for somebody who would have observed this, who would have been looking down the wrong end of a gun, saying a T-shirt wrapped in a certain fashion, could be mistaken for a ski mask or called a ski mask. Especially when the other two were wearing ski masks, and you tend to confuse, blend together.

So that there is a discrepancy here. I don't think it's material.

The other fact from the-- Jerrell's statement that the State relies on heavily, is the fact that his statement is-- on the amount of the proceeds, virtually squares with the amount that was actually taken. It's $10 off.

Now, there's-- I been in-- You know, had the invitation to-- again, an invitation to speculate as to where else that could have come from. But I-- I don't want to speculate as to where else.

I think it came from-- As was found earlier, it came from Jerrell's personal knowledge, having been

involved in this offense and having been involved when the-- when the proceeds were counted.

It was pointed to, also, the disposition of the masks and the guns; and, that there was some discrepancy there. That somebody said-- I think Jerrell said, the masks were put in the trunk of the car, and that's the last he saw them. And somebody else, no, they were burned-- the masks and the two plastic guns, were burned on a grill behind Roscoe's house.

I don't think those two statements are mutually exclusive at all. Both could easily have happened. Stuff was thrown in the trunk. Drove over to Roscoe's house and put it on the grill and burned it. I don't think that's a discrepancy.

As to Randall J[redacted]' testimony, Randall J[redacted] gave two statements to the Police. The first was-- I think was basically a denial. And the second one,-- In the second statement, he gave some information about the offense, which he said he obtained from Roscoe. And he said Roscoe told him that Jerrell, Jerrad, and Roscoe had committed the robbery at the McDonalds.

Randall was called as a witness at trial. And he was questioned about his statement. And he had a failure of memory as to whether he made the statement to Detective Newall. And he was shown a surveillance photo that he had

been also shown when he made his statement and-- and he had, from that photo, identified Jerrad, Jerrell, and Roscoe.

At trial, he denied that the three persons shown on that surveillance photo were Jerrell, Jerrad, and Roscoe. And he denied ever speaking to Roscoe about the robbery. And he further denied that Roscoe ever told him that he, Jerrell, and Jerrad committed the robbery.

The State then called Detective Newall, and they used him to seek to introduce the statements.

The statements were moved in by Counsel for Jerrad. They were received without objection.

So, there was some questions, with the absence of objection. It was waived.

But I think this is an issue that bears some discussion, because there's-- there are potential constitutional problems here.

Randall's-- Well, Detective Newall's statement about what Randall said, is at least two levels of hearsay. And from-- from Detective Newall, to Randall. And from Randall to Roscoe.

And there are potential Sixth Amendment confrontation problems for both Jerrad and Jerrell implicit in this statement. Jerell never has the opportunity to confront Roscoe.

While the statement is part of the body of evidence in this case, this Court did not rely on it as part of its decision. Nor did I subjectively consider it in reaching the conclusions here, that were reached in this case. And therefore, that any-- any error that may have occurred from the admission of this statement, without objection, assuming you get beyond the "without objection" part and you get to the merits here, I submit that that's harmless error.

But I think because potentially there are constitutional problems-- potential constitutional problems involved here, I think it needs at least to be noted.

And there's language in the case of State versus Nyren, -- That's 133 Wis Second, 430, Court of Appeals case, at Pages 441, 442 -- about errors and constitutional rights and whether the errors are harmless or not. And I think, considering that language, I thought the issue does bear mention. It ought to be mentioned, discussed, for purposes of any reviewing Court.

Next I'd like to move on to Dr. Cavanaugh. At the close of the trial in this matter, this Court indicated serious problems with Jerrell's credibility. I thought basically what Jerrell had done here was, he had made a statement. And then, upon further reflection, realized that this statement implicated not only himself, but also

other family. His brother and a cousin. And sought to recant the statement at trial. Take it back. And I found his credibility suspect.

Some of his statements to Dr. Cavanaugh take his credibility to new heights or depths, depending how you want to consider it, especially when that testimony is matched with what he said at trial.

And he said things such as-- He told Dr. Cavanaugh such things as Detective Spano repeatedly threatened him with 65 years in jail. His requests to use the bathroom were denied. The information that he learned about the case, that was not from being there, but rather being allowed to read Police reports during his interrogation.

And these are all statements that are seriously at odds with what had been-- what the body of evidence at trial was.

The State essentially agreed in their belief that Dr. Cavanaugh's report should be considered under the Interests in Justice standard.

I had questions, and I think I might have said some things on the record here at one point in questioning, whether this is really new evidence on Dr. Cavanaugh's report here. This is more just re-litigation of something that was-- was litigated, although a different path was taken. I don't--

I don't think Dr. Cavanaugh's report is newly discovered evidence under 938.46 or under any other standard. Dr. Cavanaugh's report is based entirely upon what Jerrell told her. And I think she indicated in her testimony, she accepted uncritically everything that she was told by Jerrell.

And this Court already made some findings at trial-- at the trial, about Jerrell's credibility. And the fact that Jerrell had placed family loyalty and fear of incriminating Roscoe H[redacted],-- This is at least the Court's view of the evidence. --That he placed those things above telling the truth. And, in this Court's view, when he went to see Dr. Cavanaugh, he went even further afield from the truth.

So that given some of the things that Dr. Cavanaugh was told, I'm not surprised at her conclusions.

And I don't think the interests of justice require that this report, which is not new evidence and which is based on statements made by Jerrell, which are at sharp divergence with his trial testimony, deserves to be considered in the interest of justice.

I think it's just simply a further attempt to go further down the road than I think-- with what Jerrell did at the trial, where he was-- he did what he did because of family loyalty and fear of incriminating his

brother or Roscoe. That's why he said what he said. And this is just going a little further down that road.

I think that pretty much covers, in substance, the motions that have been filed here.

I haven't gone through motion by motion. I handled it more by issue areas.

MR. LICATA: Judge, I would only ask-- I know it came up late in the game, but the ineffective assistance of Miss Boyle. If there was. And if there was, was it harmless error.

JUDGE WASIELEWSKI: Oh. Yes, I-- As to the ineffective assistance claim, again the fact that some of the legal issues that have been raised here have been-- there was-- Some of Jerrell's arguments, have been rejected by this Court. I think the findings of ineffective assistance, were premised on the strength of those legal arguments as to the issues. And if those issues-- I mean, the performance of counsel is not deficient if the Court later determines that a legal issue is-- doesn't have merit or the Court doesn't buy the argument.

So I think that that necessarily decides the ineffective assistance claim.

I think we all know there's no such thing as a perfect trial, either by a Court or by counsel. And you'll-- As long as you have humans, human beings, on the bench,

as long as you have human beings practicing law, you have a human factor involved, and there will be errors made from time to time. But I-- I don't think, you know,--

You know, would Miss Boyle do this case differently knowing what she knows now? Possibly. But I don't think-- That's not the prism by which you should look here.

Supposed to avoid the ineffectiveness of counsel by hindsight. We're all supposed to have hindsight. Miss--

And the scrutiny, the judicial scrutiny, which is to be given her performance, is to be highly deferential.

And looking at her performance in this case, I certainly don't see that she did anything that would have made for a different outcome if she had done something differently. I think she worked with what she had in front of her.

You know, at the time she was representing Jerrell, he was saying things totally different than he's saying now. And counsel were only working with what they're told by the client. And when you have a client change as drastically now,-- and you have Jerrell saying things so drastically different than he was saying when this case was tried, as to what happened, in the interview process particularly, and in respect to the confession, that-- that certainly is something you can't-- you know, you can't lay that at the feet of counsel. That's nothing--

has nothing to do with ineffective representation.

So that I don't find any deficiency in her performance, or any prejudice to Jerrell from what she did in this case. She's a capable counsel. She argued well. She argued hard for Jerrell. She worked with the facts that she was supplied by her client. And that's what a criminal-- that's all a criminal attorney can do, is work with the facts they're supplied by the clients.

In a sense, you're placing the hand you're dealt. That's all you're really doing.

Client comes in your office, presents with a situation. And the lawyer has to, okay, here are your alternatives, here is what we can do with this. It's true no matter if it's this kind of a case or, you know, somebody gets in a car accident and they go see a lawyer. I mean, that's what lawyers do. And I-- I don't--

You know, what we have here largely is a situation where things are radically changed, or Jerrell's version of the facts with regard to what happened while he was in custody, have radically changed. And I thought he had serious credibility problems at the trial. And I don't think this change has done anything to enhance his credibility, in my estimation. In fact, entirely the opposite.

And I think that Briget Boyle worked with the facts

that she was given by her client. And she did a workman-like job here.

The issue for the Miranda-Goodchild hearing, as the facts were presented to her, was the question of the promise to go home, after one night in Detention.

You know, now, afterwards, the issue of-- of the denial of the telephone calls,-- that issue has been raised.

But I don't think even raising that issue, would have changed the outcome at the hearing, you know, had Briget Boyle raised that issue.

It could have been raised, certainly. It's in the Therio case.

But I don't think that would have been outcome determinative here.

So that I don't believe that the-- Miss Boyle made some strategy decisions that I think were based upon the information she was given by her client. And that's all any lawyer can do.

And I don't think her assistance to Jerrell J[redacted] in this case was ineffective.

So I'm going to ask Mr. Licata, if you draw an appropriate order, then submit it under the five-day rule, copy to counsel.

I don't know if the five-day rule applies out here.

COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-3423 Cir. Ct. No. 01 JV 1168

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

IN THE INTEREST OF JERRELL C.J.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JERRELL C.J.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 WEDEMEYER, P.J. Jerrell C.J. appeals from an order adjudging him delinquent for the commission of armed robbery, party to a crime, contrary to

WIS. STAT. §§ 943.32(1)(b) & (2) and 939.05 (2001-02).[1] He also appeals from an order denying his postdisposition motion. Jerrell claims the trial court erred in denying his motion seeking to suppress his statement. He contends that his statement was involuntary and that the police officers should have granted his request to call his parents. Because the trial court did not err in denying the motion to suppress, we affirm. We do, however, caution that a juvenile's request for parental contact should not be ignored.

I. BACKGROUND

¶2 On Sunday, May 27, 2001, at approximately 12:18 a.m., three young men entered the front door of a McDonald's restaurant in Milwaukee. Each was wearing a ski mask and holding a gun. Two of the men went into the kitchen area and told the employees to get down. The third went to the office, pointed a gun at the manager and said, "give me all the money." The manager complied and gave the robber $3590. The robbers left.

¶3 Two employees offered descriptions of the robbers. One employee stated: one was seventeen to nineteen years old, 5'10" to 5'11" tall, medium complexion and build, wearing a black hat and black knit face mask; the second was also seventeen to nineteen years old, had a lighter complexion, a thin build and was 5'8" to 5'9" tall, and wearing a knit face mask. Both were holding guns.

¶4 Another employee described the man with the lighter complexion: eighteen to twenty-three years old, light brown "bright" eyes, thin build, wearing a ski mask, holding a small black gun and "the inside of the barrel was red." That

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

evening, Roscoe H., Jerrad H. and Randall J. were detained and later arrested as suspects in the robbery. On Monday morning, May 28, 2001, at approximately 6:20 a.m., fourteen-year-old Jerrell was arrested at his home. He was taken to the police station, booked, and placed in an interrogation room. He was handcuffed to the wall of the room for approximately two hours, until 9:00 a.m. At that time, Police Detectives Ralph Spano and Kurt Sutter began the interrogation.

¶5 The two detectives entered the room, introduced themselves to Jerrell, removed his handcuffs, and asked him some background questions. Jerrell told the officers that he was fourteen years old and in eighth grade. He provided the names, addresses and phone numbers of his parents and siblings.

¶6 At 9:10 a.m., Spano advised Jerrell of his ***Miranda***[2] rights. Jerrell waived his rights and agreed to answer questions. Spano told Jerrell that his cousin, Jerrad, had "laid him out for this robbery." Jerrell denied committing any robbery. Spano encouraged Jerrell to be truthful and honest. Jerrell denied participating in the robbery. This exchange continued for the better part of the morning. At times, Spano raised his voice "short of yelling." Jerrell stated that "kind of frightened" him.

¶7 Jerrell was kept in the interrogation room until lunchtime, although several food and bathroom breaks were provided. At lunchtime, Jerrell was placed in a bullpen cell for about twenty minutes where he ate lunch. Interrogation resumed at approximately 12:30 p.m., and Spano said Jerrell "started opening up about his involvement" between 1:00 p.m. and 1:30 p.m. Also, at this time, Jerrell made two or three requests to telephone his mother or father. Spano denied the

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

requests, indicating that he "never" allows a suspect to talk to anyone during interrogation because it could stop the flow of, or jeopardize, the interrogation. The interrogation was completed at 2:40 p.m. when Jerrell signed a statement admitting his involvement in the McDonald's robbery.

¶8 Jerrell moved to suppress his statement, claiming it was involuntary, unreliable, and a product of coercion. The trial court denied the motion. Jerrell and Jerrad were tried jointly in a court trial. The trial court adjudged both of them delinquent for committing armed robbery, party to a crime.

¶9 Jerrell filed a postdisposition motion seeking a new trial on the basis that his admission was unreliable, untrustworthy and involuntary. The motion pointed out the inconsistencies between Jerrell's statement and that of the eyewitnesses and other participants. The suggestion was that Jerrell, in fact, did not participate in the robbery, but was coerced into admitting participation during the police interrogation. The trial court found the discrepancies between Jerrell's statement and the other evidence were not material. The court concluded that Jerrell's knowledge of the total amount of money stolen, and his description of the gun, were sufficient evidence of reliability. The trial court also found that Jerrell's statement, under the totality of the circumstances, was voluntary. Jerrell now appeals.

II. DISCUSSION

A. Statement.

¶10 The issue in this case is whether Jerrell's statement was voluntary. Jerrell contends that the statement was coerced. He argues that given his age, the length of the interrogation, the lack of corroboration and the inconsistencies in the

statement, the statement was unreliable and involuntary. The State responds that the interrogation did not involve any coercive techniques, it took place during the day, Jerrell had two prior police contacts, he was provided food and other breaks, and that any inconsistencies between Jerrell's statement and established facts can be explained. The trial court agreed with the State.

¶11 The question we must resolve involves both a constitutional issue, whether Jerrell's statement was voluntary, and a discretionary issue, whether the trial court erroneously exercised its discretion in denying Jerrell's motion to suppress the confession. In reviewing the latter, we will not disturb the trial court's findings of historical or evidentiary facts unless they are clearly erroneous. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 682, 482 N.W.2d 364 (1992). However, the former involves a constitutional issue, subject to independent appellate review. ***State v. Esser***, 166 Wis. 2d 897, 904, 480 N.W.2d 541 (Ct. App. 1992).

¶12 Our supreme court recently addressed the issue of whether a statement is voluntary in ***State v. Hoppe***, 2003 WI 43, ¶¶ 34-40, 261 Wis. 2d 294, 661 N.W.2d 407.

> A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.

Id., ¶36 (citation omitted). We first must address whether Jerrell's confession was "coerced or the product of improper pressures exercised" by the police officers conducting the interrogation. ***Id.***, ¶37. We cannot conclude that the confession was involuntary without first concluding that coercive or improper police conduct occurred. ***Id.***

¶13 In determining whether Jerrell's confession was voluntary, we consider the totality of the circumstances. ***Id.***, ¶38. This test requires "balancing ... the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." ***Id.*** Relevant factors to consider include the individual's age, maturity, intelligence, education, experience, ability to understand, and presence of parents, guardian or counsel, ***Theriault v. State***, 66 Wis. 2d 33, 42-43, 223 N.W.2d 850 (1974), as well as the defendant's physical and emotional condition, ***Hoppe***, 261 Wis. 2d 294, ¶39. We balance the personal characteristics against the police pressures and tactics employed to induce the confession, such as

> the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id. Finally, when a juvenile is involved, courts must use the "greatest care" in assessing the voluntariness of the confession. ***In re Gault***, 387 U.S. 1, 55 (1967).

¶14 We begin then with whether any coercive or improper police conduct occurred. We review whether, under the totality of the circumstances, Jerrell's statement was "coerced or suggested," or "the product of ignorance or rights or of adolescent fantasy, fright or despair." ***Gault***, 387 U.S. at 55. This test involves balancing personal characteristics of the individual against the conduct of the police during the interrogation.

¶15 The first factor to be considered is age. Jerrell was fourteen years and ten months old at the time of the interrogation. Citing ***Hardaway v. Young***, 302 F.3d 757 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1802 (2003), Jerrell argues

that this factor favors finding that the statement was not voluntarily given: "The difficulty a vulnerable child of 14 would have in making a critical decision about waiving his *Miranda* rights and voluntarily confessing cannot be understated." *See* ***id.*** at 764. He points out that the younger the child, the more carefully the court must scrutinize police interrogation tactics. *See* ***id.*** at 765. The State emphasizes that Jerrell was *almost* fifteen years old and had two prior contacts with the police in which he was advised of his ***Miranda*** rights and waived them. The State also focuses on the fact that no evidence demonstrated that Jerrell was emotionally distraught or upset by the interrogation of the officers. Rather, Jerrell seemed to be "smirking" during most of the interrogation. The trial court found that Jerrell's age did not result in a statement that was a product of "adolescent fantasy." We cannot locate anything in the record to render that finding erroneous.

¶16 Although Jerrell was under fifteen years old at the time he made his statement, there was no indication in the record that his age interfered with his ability to provide a voluntary statement. As noted by the trial court, Jerrell was emotionally stable during the entire interrogation and showed no signs of psychological breakdown as a result of the questioning.

¶17 The second factor considered is education and intelligence. The trial court noted that Jerrell was in eighth grade. Given the time of year this incident occurred, it is safe to assume that Jerrell was nearing the completion of this grade. There is some dispute, however, regarding level of intelligence. The trial court noted that Jerrell had a 3.6 grade point average and appeared to be of higher than average intelligence. Jerrell points out that the high grade point average was not typical of past grades and that his IQ tests placed him in the lower end of average intelligence. The trial court found that these factors did not interfere with Jerrell's

ability to give a voluntary statement. There is evidence in the record to support that finding and, therefore, we will not disturb it.

¶18 Additional factors to consider are Jerrell's maturity and experience. The trial court found that Jerrell appeared to be a mature, articulate individual. There was no evidence of any mental disease or defect, no indication that he was impaired by drugs, medication or alcohol, and no information suggesting he was in any physical pain or injured, and it appeared that Jerrell was "not apprehensive, fearful, [or] fretful while he was questioned." The trial court noted that immediately following the interview, Jerrell appeared "bored." The trial court also found that Jerrell had two previous contacts with police, thus suggesting that his susceptibility to coercive police tactics would be reduced. *See* ***Hardaway***, 302 F.3d at 767 (it may be presumed that children who have a history of criminal involvement are more likely to understand their ***Miranda*** rights, and less likely to be susceptible to coercive conduct). Jerrell argues that his two prior contacts were insignificant as both involved misdemeanors and not serious offenses. Although we can appreciate the distinction, the fact remains that on both of those two prior occasions, Jerrell was given his ***Miranda*** rights and waived them. Accordingly, the previous police contacts weigh in favor of finding that Jerrell's statement was voluntary.

¶19 During the questioning, Jerrell made several requests to call a parent. The trial court did not find this factor significant in this case for several reasons. First, the requests came after Jerrell had admitted involvement, and second, the denial of the request was not for the purpose of denying Jerrell his right to counsel or right to remain silent. Therefore, the trial court found that the denial did not constitute improper police conduct. Accordingly, this factor did not implicate the voluntariness of Jerrell's confession. Although we address this issue more in

depth in the latter part of this opinion, for dispositional purposes, we cannot conclude that the trial court's finding was clearly erroneous. The police officers' denial of Jerrell's request to call his parents was not *per se* coercive. ***Theriault***, 66 Wis. 2d at 38.

¶20 In reviewing the totality of the circumstances, we also examine the length and circumstances of the interrogation. Jerrell's interview took place during the daylight hours and lasted a little more than five and one-half hours. Thus, the questioning did not take place during a time period that would suggest Jerrell might have been tired and, as a result, unfairly susceptible to police questioning. *See* ***Johnson v. State***, 75 Wis. 2d 344, 355, 249 N.W.2d 593 (1977) (statement given during the time an individual would otherwise be asleep is a factor to consider when evaluating an individual's susceptibility to police pressure). During the questioning, Jerrell was afforded food and bathroom breaks, including a twenty-minute lunch break. It was estimated that throughout the interview, there were between five and seven breaks.

¶21 Jerrell points out that he was handcuffed in a bullpen cell from the time he arrived at the station after being picked up at 6:20 a.m., until the interview began at 9:00 a.m. He points out that throughout the entire morning he repeatedly denied any involvement. He stated that he was somewhat fearful when Detective Spano raised his voice. He also contended that the officers promised him that if he confessed to the truth (his involvement), he would spend only one night in jail and then could go home. Jerrell points out that there are many inconsistencies between his statement and those of Jerrad and other witnesses. For example, Jerrell's statement says that he did not have a black ski mask, so he used a black T-shirt as a mask. All of the employees of the McDonald's stated that the robbers wore black ski masks. Jerrell's statement indicates that another individual, "Melvin,"

was involved in the crime, that Melvin's car was used, and that he used some of the stolen money to buy a new cap and new shoes. Jerrad's statement, in contrast, does not mention Melvin or Melvin's car. Further, police never found the new cap or new shoes to which Jerrell referred. In addition, Jerrell contends that the eyewitnesses indicated that the light-complected robber had brown "bright" eyes. Jerrell has green eyes.

¶22 The trial court considered all of these facts in rendering its decision. It made credibility determinations between the testimony of the police officers and that of Jerrell. The trial court found the police officers' testimony to be credible and that no coercive tactics were used. The trial court concluded that under the totality of the circumstances, Jerrell's statement was voluntary and not a product of coercion. In part, the trial court supported its conclusion because Jerrell's statement contained details of the crime that an uninvolved person would not have known—such as the amount of money stolen and the description of the gun.

¶23 Having independently reviewed the totality of the circumstances and the findings of the trial court, we cannot overturn the trial court's determination, which was based, in large part, upon the credibility of the witnesses. The findings made by the trial court are not clearly erroneous and, therefore, will not be reversed by this court. Because there is no evidence of police coercion or improper conduct, we conclude that Jerrell's confession was voluntary. Based on

the foregoing, we conclude that the trial court did not erroneously exercise its discretion in denying Jerrell's request to suppress his statement.[3]

B. Request for Parents.

¶24 We address separately an issue that does not affect the disposition of this appeal, but merits special attention from this court. As noted, after Jerrell admitted involvement, but before his statement was complete, he made two or three requests to call a parent. Detective Spano denied such a request for several reasons: (1) Spano does not let "anyone call their parents or relatives during the interrogation or anybody else;" (2) he did not want to stop the flow of the confession; and (3) allowing the phone call could adversely affect the investigation because Spano would lose control relative to any information exchanged via the telephone.

¶25 Although we have concluded that, under the facts of this particular case, the request to call parents and the denial of the request did not impact on the voluntariness of Jerrell's statement, we are gravely concerned about this issue. We are not alone. The decision to confess falsely by the youth of this country is

[3] We also conclude that the trial court's credibility assessment of the psychologist's testimony offered as new evidence during the postdisposition motion was not erroneous. As the trier of fact, the trial court is the sole arbiter of the credibility of witnesses, including expert witnesses. ***State v. Kienitz***, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999). The trial court was free to accept or reject the psychologist's opinion. Here, the psychologist offered an opinion that Jerrell did not knowingly and voluntarily waive his ***Miranda*** rights. That opinion, however, was based in part upon Jerrell's representations to the psychologist. The trial court compared those representations to the testimony Jerrell offered at trial and concluded that Jerrell's statements were inconsistent and therefore could not be relied upon. As a result, the trial court found that the psychologist's opinions, based upon incredible representations, could not be deemed trustworthy. We cannot conclude that the trial court's findings were clearly erroneous or that its credibility assessment was erroneous. Accordingly, we reject Jerrell's claim that the trial court's assessment on this issue was incorrect.

the subject of numerous legal treatises across the nation. *See, e.g.*, Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997). Concerns regarding this subject were submitted to us via the amicus curiae brief filed in this case on behalf of The Children and Family Justice Center at Northwestern University School of Law's Bluhm Legal Clinic and the Wisconsin Innocence Project at the University of Wisconsin Law School's Frank J. Remington Center.

¶26 In that amicus curiae brief, the authors stated that as of April 2003, 127 wrongly convicted people have been exonerated by DNA evidence. Of the first 111, 27 involved false confessions or admissions. The amicus authors argue that current psychological interrogation techniques are a major contributing factor to the false confession problem, which is magnified when the individual is a child. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J. CRIM. L. & CRIMINOLOGY 429, 472-96 (1998). Consequently, the amicus authors ask this court for two things: (1) a *per se* rule, which would exclude confessions from any child under the age of sixteen who has been denied access to a parent or guardian; and (2) a mandatory rule requiring police to videotape all juvenile interrogations.

¶27 Although this court finds both requests compelling, we are without authority to order either. We are currently bound by the dictates of ***Theriault***, which recognizes "that special problems may arise with respect to waiver of the [***Miranda***] privilege by or on behalf of children," 66 Wis. 2d at 39 (citation omitted) but applies the totality of the circumstances test. ***Id.*** at 38-44. Our supreme court rejected a request that a *per se* rule be applied when a minor confesses without the presence of a parent or legal guardian. ***Id.*** at 44. The court

held that the absence of the parent or guardian is one factor to be considered under the totality of the circumstances test. ***Id.*** Consideration of this factor affords the trial court the discretion to determine the reason behind denying a juvenile's request to call his or her parents. *See* ***id.*** at 48. "If the police fail to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements." ***Id.*** Accordingly, we are bound by that precedent.

¶28 We do note, however, that ***Theriault*** was decided in 1974, and the debate between the totality of the circumstances test versus a *per se* rule has been the focus of much recent attention. At least 13 states—Colorado, Connecticut, Hawaii, Indiana, Iowa, Massachusetts, Montana, New Mexico, North Carolina, Oklahoma, Texas, Vermont and West Virginia—have adopted, by case law or legislative action, some form of the *per se* rule. *See* Thomas J. Von Wald, Note, *No Questions Asked! State v. Horse: A Proposition for a Per Se Rule When Interrogating Juveniles*, 48 S.D. L. REV. 143, 164 n. 237 (2002-03).

¶29 Reasons behind a *per se* rule are understandable. False confessions from juveniles are serious issues that need to be addressed. Legal scholars suggest that children simply do not understand their ***Miranda*** rights as well as adults. Grisso, *Juvenile's Capacities to Understand Miranda Warnings: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1160 (1980). The Supreme Court stated that this is so because children lack the emotional and mental capability to make fully informed decisions. *See* ***Bellotti v. Baird***, 443 U.S. 622, 640 (1979) (children are incapable of making decisions that "take account of both immediate and long-range consequences.") The implication is that, as a result, children are less capable of making important decisions. The Wisconsin legislature has recognized

this tenet in a variety of ways: an individual must be twenty-one years old to purchase alcohol, WIS. STAT. § 125.97; an individual less than eighteen years old cannot purchase tobacco products, WIS. STAT. § 134.66; sixteen and seventeen year olds cannot get married without parental permission, WIS. STAT. § 765.02; children may not buy or lease a car without parental consent, WIS. STAT. § 218.0147; children under fourteen may not change their name without parental consent, WIS. STAT. § 786.36; and girls under eighteen may not obtain an abortion without parental consent (unless certain exceptions apply), WIS. STAT. § 48.375.

¶30 One author presents studies which demonstrate that a minor is more likely to give a false confession because of the inherent nature of children to want to please authority figures, coupled with the high suggestibility levels in children. *See* Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 504-05 (2002). This article states that in some cases, "minors are incapable of fully realizing the consequences of their decisions," and therefore confess "because they believe it is the only way to end a psychologically coercive interrogation." ***Id.*** at 505. It is argued then, that taking this together with the additional knowledge that police can, without breaking any laws, lie about evidence, engage in trickery, and verbally harass suspects in order to obtain a confession, juveniles may confess to crimes they did not commit. According to one study, over a two-year period, almost a dozen juveniles in the United States who confessed to committing murder were subsequently proven innocent. ***Id.*** at 489. This problem is particularly troubling because once a child confesses, such evidence carries great weight with the fact-finder.

¶31 Having set forth the problem, the issue becomes: What is the solution? Courts and legislatures across the country are attempting to tackle the

problem. The Vermont Supreme Court has set forth three criteria that must be satisfied before a juvenile's waiver would be found to be voluntary: (1) the juvenile "must be given the opportunity to consult with an adult; (2) that adult must be one who is not only generally interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and (3) the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile." Von Wald, 48 S.D. L. REV. at 165 (citation omitted).

¶32 Alaska and Minnesota have recording requirements for all custodial interrogations. *See* ***Stephan v. State***, 711 P.2d 1156, 1159 (Alaska 1985); ***State v. Scales***, 518 N.W.2d 587, 592 (Minn. 1994). Some suggest that the "totality of the circumstances" analysis works best when it is based on a videotape of the interrogation. It is this court's opinion that it is time for Wisconsin to tackle the false confession issue. We need to take appropriate action so that the youth of our state are protected from confessing to crimes they did not commit. We need to find safeguards that will balance necessary police interrogation techniques to ferret out the guilty against the need to offer adequate constitutional protections to the innocent.

By the Court.—Orders affirmed.

Recommended for publication in the official reports.

¶33 SCHUDSON, J. (*concurring*). Although I agree with the majority's conclusion, I believe its opinion goes too far.

¶34 Was Jerrell's statement coerced? Because, as the majority correctly concludes, (1) the trial court's factual findings are not clearly erroneous, and (2) ***Theriault v. State***, 66 Wis. 2d 33, 223 N.W.2d 850 (1974), precludes the *per se* rule the Remington Center seeks, the answer is no. And here, under the totality of the circumstances, the answer is all the more clear because Jerrell's request to call his parents came *after* he confessed.

¶35 That should conclude the analysis of the central issue in this appeal. The majority, however, while acknowledging that its additional discussion "does not affect the disposition of this appeal," majority, ¶24, goes on to comment at length on various topics relating to the possible propriety of a *per se* rule, ***id.***, ¶¶25-32. In doing so, the majority approvingly cites certain case law and commentaries even though, in this case, they were not subjected to any debate or adversarial testing. This, I think, is unwise.

¶36 For sound reasons, we usually refrain from addressing issues that need not be resolved. *See* ***State v. Mikkelson***, 2002 WI App 152, ¶17 n.2, 256 Wis. 2d 132, 647 N.W.2d 421 (we decide cases on the narrowest grounds). And for equally sound reasons, we usually resist the temptation to offer advisory opinions, particularly where the subject is a complicated one that has not been thoroughly explored through the adversarial process. *See* ***State v. Robertson***, 2003 WI App 84, ¶32, 263 Wis. 2d 349, 661 N.W.2d 105 ("Courts act only to determine

actual controversies—not to announce principles of law or to render purely advisory opinions."). We should not deviate here.

¶37 Therefore, although I also am intrigued by the Remington Center's suggestions and, in particular, by its arguments favoring the videotaping of all police interrogations, I believe these issues are best left unaddressed in this appeal. Accordingly, while agreeing with much of the majority's opinion, I do not join in it entirely and, therefore, respectfully concur.

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,841 words.

Dated this 5th day of May, 2004.

Signed:

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 02-3423

In the Interest of Jerrell C.J.,
A Person Under the Age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JERRELL C.J.,

Respondent-Appellant-Petitioner.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS AFFIRMING A DELINQUENCY ADJUDICATION AND THE DENIAL OF A POSTDISPOSITION MOTION, BOTH IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE FRANCIS T. WASIELEWSKI, CIRCUIT JUDGE, PRESIDING

PETITIONER-RESPONDENT'S BRIEF-IN-CHIEF AND APPENDIX

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PETITIONER-RESPONDENT'S BRIEF-IN-CHIEF AND APPENDIX

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting respondent-appellant-petitioner Jerrell C.J.'s petition for review, this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. (Rule) § 809.19(3)(a). Relevant facts will be presented where necessary in the State's Argument.

The court of appeals' decision in this case—*State v. Jerrell C.J.*, 2004 WI App 9, 269 Wis. 2d 442, 674 N.W.2d 607—is reproduced in the appendix to this brief-in-chief (R-Ap. 101-17).

ARGUMENT

I. Jerrell C.J. Forfeited His Right to Challenge The Validity Of His *Miranda* Waiver By Stipulating To The Validity Of The Waiver In The Circuit Court, And By Failing To Press His Claim Of Ineffective Assistance Of Counsel In The Court Of Appeals And In This Court.

According to pages 1 and 2 of Jerrell's brief-in-chief, the first issue presented for this court's review is whether Jerrell's custodial statement to Milwaukee Police Detective Ralph Spano was constitutionally voluntary. Folded into his argument on that issue is a separate question: whether Jerrell knowingly, voluntarily, and intelligently waived his *Miranda*[1] rights before making his statement. *See* Jerrell's brief-in-chief at 12 (point heading and citation to *Miranda* in first paragraph). This court should decline to answer that question.

The State agrees that a suspect must knowingly and intelligently waive his rights against self-incrimination and to the assistance of legal counsel in order for a

[1] Under *Miranda v. Arizona*, 384 U.S. 436 (1966), a person facing custodial interrogation must be warned that he has the right to remain silent, that anything he says may be used against him in court, that he has the right to an attorney, and that an attorney will be appointed for him if he cannot afford one.

confession made during a custodial interrogation to be admissible in evidence against him. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 421 (1986). The State also agrees that it bears the burden of demonstrating a proper *Miranda* waiver when the issue arises in the circuit court. *See State v. Mitchell*, 167 Wis. 2d 672, 697-98, 482 N.W.2d 364 (1992) (State establishes *prima facie* case of proper *Miranda* waiver where individual has been advised of all of his rights under *Miranda*, indicates an understanding of those rights, and is willing to make statement).

But the validity of a suspect's *Miranda* waiver and the voluntariness of his later statement are separate inquiries. *See State v. Hernandez*, 61 Wis. 2d 253, 259, 212 N.W.2d 118 (1973). A suspect can agree that his *Miranda* waiver meets constitutional standards, yet still claim the resulting statement is involuntary.

That is what happened here. Jerrell asked the circuit court to suppress his statement on grounds of involuntariness, but stipulated to the validity of his *Miranda* waiver. *See, e.g.*, Record 5 (suppression motion); 51:9-10 (stipulation as agreed upon by counsel for Jerrell and assistant district attorney); 58:46 (circuit court's finding of stipulation at postdispositional motion, noting that, because of the stipulation, no testimony was taken on validity of *Miranda* waiver and no findings made on point). To be sure, Jerrell tried to shed his decision to stipulate in postdispositional proceedings. He eventually filed a modified postdispositional motion challenging trial counsel's performance in litigating his motion to suppress (5; 32:6-8). But Jerrell chose not to press this claim in either the court of appeals or this court.

By stipulating to the validity of the *Miranda* waiver, Jerrell relieved the State of its obligation to establish that he was informed of his constitutional rights under *Miranda*, that he understood them, and that he knowingly, voluntarily, and intelligently waived them. Both the State and the circuit court relied on that representation. Jerrell cannot repudiate that position now, particularly when the

agreed-upon stipulation led the State to forego making a complete record of the facts and circumstances surrounding his *Miranda* waiver. "An accused cannot follow one course of strategy at the time of trial and if that turns out to be unsatisfactory complain he should be discharged or have a new trial." *Cross v. State*, 45 Wis. 2d 593, 605, 173 N.W.2d 589 (1970).

II. Jerrell's Confession Was Constitutionally Voluntary.

A. Introduction.

Both the circuit court and the court of appeals concluded that Jerrell's confession to Detective Spano was constitutionally voluntary. *See* Record 52:19-25; 58:44-51; *Jerrell C.J.*, 269 Wis. 2d 442, ¶¶ 12-23.

Jerrell challenges the correctness of those decisions in Part I of his brief-in-chief. He argues that Milwaukee police exploited his age, his lack of comprehension, his suggestibility and other personal characteristics to overbear his will. He argues that the length of questioning was unfairly coercive in light of his age. And he argues that police improperly coerced his statement by denying his requests to telephone his parents during questioning.

Jerrell's arguments are not persuasive. The circuit court found sufficient facts based upon competent evidence to hold that Jerrell's confession was not coerced. The totality and degree of factors identified by Jerrell are not sufficient to render his confession constitutionally involuntary. The State's position is set forth below.

B. Controlling Principles Of Law.

"The voluntariness of a confession, whether made by a juvenile or an adult, is evaluated on the basis of the totality of the circumstances surrounding that confession."

Hardaway v. Young, 302 F.3d 757, 762 (7th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003), citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), and *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). *See also Theriault v. State*, 66 Wis. 2d 33, 41, 223 N.W.2d 850 (1974).[2]

The principles of law governing the voluntariness inquiry are summarized in *State v. Hoppe*, 2003 WI 43, 261 Wis. 2d 294, ¶¶ 34, 36-40, 661 N.W.2d 407:

> The question of voluntariness involves the application of constitutional principles to historical facts. We give deference to the circuit court's findings regarding the factual circumstances that surrounded the making of the statements. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). However, the application of the constitutional principles to those facts is subject to independent appellate review. *Fulminante*, 499 U.S. at 287; *Clappes*, 136 Wis. 2d at 235.
>
> . . . .
>
> If Hoppe's statements were involuntary, the admission of the statements would violate his due process rights under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 8 of the Wisconsin Constitution. *Rogers v. Richmond*, 365 U.S. 534, 540 (1961); *see State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 654 (1989). A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by

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[2] At the end of the 2001 legislative session, 39 states used the totality of the circumstances test: Alabama, Alaska, Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. *See* Szymanski, L., *Juvenile Waiver of Miranda Rights: Totality of the Circumstances Test*, NCJJ Snapshot 7(1) (Pittsburgh, PA: National Center for Juvenile Justice, 2002).

representatives of the State exceeded the defendant's ability to resist. *Clappes*, 136 Wis. 2d at 236; *Norwood v. State*, 74 Wis. 2d 343, 364, 246 N.W.2d 801 (1976); *State v. Hoyt*, 21 Wis. 2d 284, 308, 128 N.W.2d 645 (1964).

The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation. *Barrera v. State*, 99 Wis. 2d 269, 291, 298 N.W.2d 820 (1980). Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness. *Connelly*, 479 U.S. at 167; *Clappes*, 136 Wis. 2d at 239.

We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary. *Clappes*, 136 Wis. 2d at 236. The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers. *Id.*

The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. *Id.* The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination. *Id.* at 236-237.

The balancing of the personal characteristics against the police pressures reflects a recognition that the amount of police pressure that is constitutional is not the same for each defendant. When the allegedly coercive police conduct includes subtle forms of psychological persuasion, the mental condition of the defendant becomes a more significant factor in the "voluntariness" calculus. *Connelly*, 479 U.S. at 164; *Xiong*, 178 Wis. 2d at 534. It is the State's burden to prove by a preponderance of the evidence that the statements were voluntary. *United States v. Haddon*, 927 F.2d 942, 945 (7th Cir. 1991); *State v. Agnello*, 226 Wis. 2d 164, 182, 593 N.W.2d 427 (1999).

Additionally, "[t]he Supreme Court in the past has spoken of the need to exercise 'special caution' when assessing the voluntariness of a juvenile confession, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer, or other friendly adult." *Hardaway*, 302 F.3d at 762, citing *In re Gault*, 387 U.S. 1, 45 (1967), *Gallegos v. Colorado*, 370 U.S. 49, 53-55 (1962), and *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948).

C. Jerrell's Confession Was Constitutionally Voluntary.

The voluntariness of a confession is a question of constitutional fact. *State v. Clappes*, 136 Wis. 2d 222, 234-35, 401 N.W.2d 759 (1987). In reviewing questions of constitutional fact, this court will uphold the circuit court's findings of fact unless they are clearly erroneous. It will independently determine whether those facts meet the constitutional standard. *State v. Samuel*, 2002 WI 34, 252 Wis. 2d 26, ¶ 15, 643 N.W.2d 423. Any disputes over the factual circumstances surrounding the confession must be resolved in favor of the circuit court. *Clappes*, 136 Wis. 2d at 235.

Jerrell's attempt to shed his confession must fail. The totality of circumstances surrounding Jerrell's questioning support the lower courts' findings of voluntariness.

Jerrell was taken into custody by Milwaukee Police at approximately 6:20 a.m. on May 28, 2001, and was transported to the Milwaukee Police Administration Building (51:6-7). Jerrell was 14 years old—62 days shy of his 15th birthday—at the time of his arrest and questioning (52:22). Because of shift changes, police began their questioning at approximately 9:00 a.m. (51:7, 43). Between 6:20 a.m. and 9:00 a.m.—and consistent with Milwaukee Police Department procedures intended "to prevent suicide attempts, escape, or property damage to the room," *see State v. Agnello*, 2004 WI App 2, 269

Wis. 2d 260, ¶ 14, 674 N.W.2d 594—Jerrell was probably handcuffed by a single hand to the wall of the interrogation room (51:25-26, 43).

Jerrell was questioned by police from 9:00 a.m. until approximately 2:40 p.m. that afternoon (51:11, 21; 52:21). Detective Spano conducted the interview; his partner made occasional comments (51:12). Both men were unarmed (51:12, 26). Jerrell was questioned in a 6' by 8' interrogation room furnished with a table and three chairs (51:10, 34). He was not handcuffed (51:12, 54). There were multiple breaks of varying length taken during the questioning, including a lunch break during which Jerrell ate a hamburger and french fries (51:16-17, 20; 52:21; 58:47). During the interview, Jerrell also asked for and received soft drinks and candy bars (51:20-21; 52:21).

Jerrell believes the questioning session was impermissibly long, particularly in light of his age. Jerrell's brief-in-chief at 19-22. He is wrong. Jerrell does not address the significance of the circuit court's finding that the questioning session was interspersed with multiple breaks. He does not account for Detective Spano's testimony that Jerrell made no complaints about his physical condition (51:13), did not appear tired or fatigued (51:14), was fully cooperative (51:15), understood Spano's questions and answered them coherently (51:15-16; 52:23-24). And he does not account for the court of appeals' analysis—and rejection—of his claim:

> Jerrell was fourteen years and ten months old at the time of the interrogation. Citing *Hardaway v. Young*, 302 F.3d 757 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1802 (2003), Jerrell argues that this factor favors finding that the statement was not voluntarily given: "The difficulty a vulnerable child of 14 would have in making a critical decision about waiving his *Miranda* rights and voluntarily confessing cannot be understated." *See id.* at 764. He points out that the younger the child, the more carefully the court must scrutinize police interrogation tactics. *See id.* at 765. The State emphasizes that Jerrell was *almost* fifteen years old and had two prior contacts with the police in which he was advised of his *Miranda* rights and waived them. The State

> also focuses on the fact that no evidence demonstrated that Jerrell was emotionally distraught or upset by the interrogation of the officers. Rather, Jerrell seemed to be "smirking" during most of the interrogation. The trial court found that Jerrell's age did not result in a statement that was a product of "adolescent fantasy." We cannot locate anything in the record to render that finding erroneous.
>
> Although Jerrell was under fifteen years old at the time he made his statement, there was no indication in the record that his age interfered with his ability to provide a voluntary statement. As noted by the trial court, Jerrell was emotionally stable during the entire interrogation and showed no signs of psychological breakdown as a result of the questioning.
>
> . . . .
>
> ... Jerrell's interview took place during the daylight hours and lasted a little more than five and one-half hours. Thus, the questioning did not take place during a time period that would suggest Jerrell might have been tired and, as a result, unfairly susceptible to police questioning. *See Johnson v. State*, 75 Wis. 2d 344, 355, 249 N.W.2d 593 (1977) (statement given during the time an individual would otherwise be asleep is a factor to consider when evaluating an individual's susceptibility to police pressure). During the questioning, Jerrell was afforded food and bathroom breaks, including a twenty-minute lunch break. It was estimated that throughout the interview, there were between five and seven breaks.

Jerrell C.J., 269 Wis. 2d 442, ¶¶ 15-16, 20.

There was no enforced sleeplessness in this case. There was no lengthy, uninterrupted serial interrogation. Jerrell was not subjected to the kind of continuous questioning for long periods which would have been impermissibly coercive. The questioning in this case did not even approach the kind of grilling condemned as police overreaching by the United States Supreme Court. *See, e.g.*, *Colorado v. Connelly*, 479 U.S. 157, 163 n.1 (1986) (collecting cases in which, among other things, police interrogated defendant on medication for over eighteen hours without food or sleep; police interrogated defendant incommunicado for sixteen days in closed, windowless cell

with limited food and coercive tactics; police held defendant for four days with inadequate food and medical attention; police repeatedly questioned defendant for five days using coercive tactics; relays of police questioned defendant for thirty-six hours without sleep).

Jerrell also believes Detective Spano's refusal to allow him to speak to his parents is strong evidence of improper coercion. *See* Jerrell's brief-in-chief at 16-19. Again, Jerrell is wrong.

Absence of parental consultation is a single factor in the totality of circumstances analysis. *Theriault*, 66 Wis. 2d at 44. It is not a factor that weighs heavily in this case. After Jerrell finished eating his lunch, he began to admit his involvement in the armed robbery. After he began to admit his involvement, he asked two or three times to call his parents (51:29-30, 37; 55:102-07, 120; 58:45-46). Detective Spano framed Jerrell's request as follows: "Can I call my parents to let them know?" (55:104, 106). In the context of the questioning, Spano interpreted the request as Jerrell's desire to let his parents know he was being honest with Spano (55:105-06).

There is no evidence to indicate Detective Spano's refusal was intended to improperly overbear Jerrell's will and coerce him into making a statement. Spano testified that he does not allow subjects of custodial interrogation to contact parents or relatives during the questioning because it interferes with the flow of the questioning (55:77-78). Specifically, Spano did not allow Jerrell to make the calls because Jerrell was in the process of making a truthful statement of events and Spano did not want that flow of information interrupted (55:77-78). Spano also explained that he had no control over what Jerrell would say during the call—that Jerrell might "spurt out things like that or other similar types of statements regarding anybody else, if anybody else might have been involved in this whole robbery incident" (55:79, 127-28). Spano's refusal to allow Jerrell to call his parents was not constitutionally impermissible.

Jerrell also faults Detective Spano's "interrogation tactics" and suggests they unfairly overbore Jerrell's will. Jerrell's brief-in-chief at 22-23. Not so. Detective Spano did not use promises, threats, or violence to obtain Jerrell's confession (51:13). His "interrogation tactics" were both simple and manifestly reasonable: he chose to be straightforward with Jerrell, telling him the truth and suggesting he be truthful and honest in return (55:44-50). Spano did raise his voice and use voice inflection—not yelling, not screaming—to make points consistent with this overall strategy (51:30-31, 36; 55:83-84). This approach—emphasizing honesty and the need to be truthful—is consistent with one of the principal goals of *In re Gault*: to assure that a juvenile's confession is "not the product ... of adolescent fantasy, fright, or despair." *Gault*, 387 U.S. at 55. From the record, it does not appear as though Jerrell was suffering from significant emotional or psychological tension during the questioning. The circuit court concluded that Jerrell was not apprehensive, fearful, or fretful while he was being questioned, but instead appeared "bored" afterward (58:47-49).

At the time he made his statement, Jerrell was in eighth grade and earning a 3.6 grade point average (52:22-23; 58:46). From its superior vantage point—and having heard Jerrell testify—the circuit court concluded that Jerrell

> seemed to understand when he testified, from the Court's observations, understand the questions that were put to him. He appeared to be articulate. He was able to give articulate answers. He was able to draw distinctions which would be consistent with the high degree of intelligence that he exhibits with respect to his grades, his studies.

(52:23.) *See also* Record 58:46-47 (additional circuit court findings at close of postdispositional proceedings).

Additionally, Jerrell was not an average 14-year-old boy insofar as law enforcement experience was concerned. Twice before his arrest for the armed robbery committed in this case, Jerrell had significant police

contacts (52:23). On both of these occasions—October of 1999 and March of 2001—Jerrell was given *Miranda* warnings and executed *Miranda* waivers (51:52-53; 55:115-18). Jerrell had a basic understanding of the criminal justice system and recognized the function of police and counsel in that process. His "past brushes with the law weigh against the normal presumption that youths are specially sensitive to coercion." *Hardaway*, 302 F.3d at 767 (citations omitted). *See also Jerrell C.J.*, 269 Wis. 2d 442, ¶ 18 (citing *Hardaway*) ("it may be presumed that children who have a history of criminal involvement are more likely to understand their *Miranda* rights, and less likely to be susceptible to coercive conduct").

In postdispositional proceedings, Jerrell presented testimony from psychologist Antoinette Kavanaugh suggesting that he—Jerrell—was highly suggestible and of low average intelligence. On appeal, Jerrell offers this testimony in an effort to cast doubt on the validity of his own *Miranda* waiver and the voluntariness of his resulting statement. He also provides citations to social sciences research on the cognitive skills of juveniles as a class and their ability to understand *Miranda* warnings. *See* Jerrell's brief-in-chief at 23-27. The State has several responses.

First, as argued in Part I of this brief-in-chief, Jerrell has forfeited his right to challenge the validity of his *Miranda* waiver in this court.

Second, the circuit court discounted Dr. Kavanaugh's testimony regarding Jerrell's ability to understand *Miranda* warnings, based on the fact that Jerrell had provided her with demonstrably false information, *see* Record 58:60-63, and "she indicated in her testimony, she accepted uncritically everything that she was told by Jerrell" (58:62). The circuit court could reasonably discount her opinions on point. *See Jerrell C.J.*, 269 Wis. 2d 442, ¶ 23 n.3:

> [T]he trial court's credibility assessment of the psychologist's testimony offered as new evidence during

> the postdisposition motion was not erroneous. As the trier of fact, the trial court is the sole arbiter of the credibility of witnesses, including expert witnesses. *State v. Kienitz*, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999). The trial court was free to accept or reject the psychologist's opinion. Here, the psychologist offered an opinion that Jerrell did not knowingly and voluntarily waive his *Miranda* rights. That opinion, however, was based in part upon Jerrell's representations to the psychologist. The trial court compared those representations to the testimony Jerrell offered at trial and concluded that Jerrell's statements were inconsistent and therefore could not be relied upon. As a result, the trial court found that the psychologist's opinions, based upon incredible representations, could not be deemed trustworthy. We cannot conclude that the trial court's findings were clearly erroneous or that its credibility assessment was erroneous. Accordingly, we reject Jerrell's claim that the trial court's assessment on this issue was incorrect.

Third, Dr. Kavanaugh's evaluation protocols and professional opinions were based on the work of forensic psychologist Thomas Grisso (54:44-46). Jerrell's appellate argument also relies heavily on Dr. Grisso's research on the capacity of juveniles as a class to execute valid *Miranda* waivers and make constitutionally voluntary statements. *See* Jerrell's brief-in-chief at 16, 24, 25.

That reliance appears misplaced. In *State v. Griffin,* 823 A.2d 419 (Conn. App. 2003), the state challenged the admissibility of expert testimony regarding 14-year-old Griffin's ability to execute a valid *Miranda* waiver. The expert's opinions were based on Dr. Grisso's protocols. *Id.* at 429-30. Connecticut is a *Daubert*[3] state: the prosecution argued that Dr. Grisso's protocol lacked

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[3] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-92 (1993) (requiring trial court to make preliminary assessment of whether the reasoning or methodology underlying proffered testimony is scientifically valid and whether that reasoning can be applied to facts in issue). *See also* Daniel D. Blinka, *7 Wisconsin Practice* (*Wisconsin Evidence*), § 702.3 at 483-85 (2d ed. 2001) (comparison of *Daubert* standard with Wisconsin's rules governing admission of expert opinion testimony).

grounding in scientific fact, was based on conjecture and speculation, possessed an unacceptably high rate of error and lacked general acceptance in the appropriate expert community. *Griffin*, 823 A.2d at 431.

The Connecticut Appellate Court concluded that "the methodology underlying the test rested on novel scientific principles, theory or experiment in the field of psychology," and as such was properly subjected to a *Daubert* analysis for admissibility. *Id.* at 430.

The trial court in *Griffin* concluded that the expert's testimony—grounded in Dr. Grisso's research and protocols—flunked the *Daubert* test for admissibility:

> The court concluded that the defendant had "failed to prove that the Grisso test has sufficient scientific validity in order for the court to accept it as reliable evidence." The court found that "since the Grisso test was formulated in 1981 ... it has not been the subject of an adequate amount of testing." The court also found that the test had not been subject to adequate peer review and publication, noting that the defendant attempted to demonstrate stringent peer review and publication by citing publications written by Grisso, himself. The court labeled Grisso's efforts in this regard as "self-promotion." The court also found that the defendant had not demonstrated that the Grisso test "has been generally accepted in the relevant scientific community."

Griffin, 823 A.2d at 430.

The Connecticut Appellate Court upheld the trial court's decision to exclude the testimony:

> Having reviewed Baranoski's [proffered expert] testimony in its entirety, we are unable to conclude that the court abused its discretion. We are mindful that in reviewing the court's exercise of discretion, we do not second-guess the court's resolution of the issue or ask whether the court might have reached a different outcome. We afford the court "great leeway" in making evidentiary rulings, and such rulings "will be reversed only if the court has abused its discretion or an injustice appears to have been done. ... The exercise of such discretion is not to be

> disturbed unless it has been abused or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *State v. Pare*, 75 Conn. App. 474, 478, 816 A.2d 657 (2003).
>
> All of the court's findings find support in the record. Baranoski's testimony about peer review of the Grisso test was limited; she testified that she recalled a law review article in which the test was discussed, that the test has been discussed at seminars and, she believed, that peer review had occurred when Grisso published certain of his own writings that discussed the Grisso test. The court found that Grisso's own discussion of his test constituted "self-promotion." We are unable to conclude that the court's findings in that regard resulted from an abuse of discretion.
>
> Essentially, Baranoski did not cite any evidence, apart from her beliefs, that supported a finding that the test had gained widespread acceptance in the relevant scientific community. Baranoski testified that the test "is being recognized by forensic psychiatrists and psychologists as a good foundation from which to build future research and refinement of questions. So, it is recognized as a standard way or standard approach to assessing competency." On cross-examination, however, Baranoski did not support those assertions; she testified only that she knew of a "couple of organizations" that use the test and that it had been the subject of a law review article. The defendant argues that Grisso's "work and theories have been widely cited, relied upon and commented on in case law and law review articles." What is important, however, for purposes of *Daubert*, is whether Grisso's peers in his own scientific community have reviewed and have accepted as scientifically valid his test.

Id. at 431-32.

The State acknowledges, as it must, that this court has not expressly adopted the *Daubert* requirement that the circuit court assess whether the reasoning or methodology underlying expert testimony is scientifically valid. This court adheres to the view that the circuit court's gatekeeper role is limited: "'Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability

challenges must be made through cross-examination or by other means of impeachment.'" *Conley Pub. Group, Ltd. v. Journal Communications, Inc.*, 2003 WI 119, 265 Wis. 2d 128, ¶ 34 n.21, 665 N.W.2d 879, quoting *State v. Peters*, 192 Wis. 2d 674, 690, 534 N.W.2d 867 (Ct. App. 1995).

However, the State respectfully submits—as it has in the past—that the *relevancy* of evidence proffered by an expert witness depends on its *reliability*. *See, e.g., State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, ¶ 86, 643 N.W.2d 777 (per Crooks, J., dissenting) ("As the United States Supreme Court has stated, recently, the right to present evidence is subject to the rules of evidence, in order to ensure 'that only reliable evidence is introduced at trial.' *United States v. Scheffer,* 523 U.S. 303, 308-309 ... (1998)"). Relevance is probative worth. Unreliable evidence lacks probative worth and should not be put before a jury in the first place; "defendants cannot present irrelevant evidence." *State v. Hammer,* 2000 WI 92, 236 Wis. 2d 686, ¶ 42, 613 N.W.2d 629.

The requirements of due process were met in this case. The circuit court considered and weighed the attending facts and circumstances—not once, but twice—and concluded that Jerrell's statement was constitutionally voluntary (52:19-25; 55:44-72). This court should not disturb those findings on appeal.

III. This Court Cannot Invoke Its Constitutional Superintending Authority To Require An Interested Adult's Presence During Custodial Interrogation Of A Juvenile, Or To Require Electronic Recording Of The Interrogation.

The state and federal constitutions do not require police officers to allow a juvenile to consult with an interested adult before and during custodial interrogation. *See Fare*, 442 U.S. at 724-28 (explicitly recognizing the applicability and propriety of the totality-of-circumstances

test in cases involving *Miranda* waivers and custodial statements). *See also Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1996) ("[N]either federal statutory nor constitutional law requires that a juvenile's parents be notified prior to obtaining a confession"); *Hardaway*, 302 F.3d at 765 ("Even refusing a child's request to have a parent or other friendly adult (other than a lawyer) present is not enough to suppress the confession if other factors indicate that the confession was voluntary"); *State v. Hezzie R.*, 219 Wis. 2d 848, 891, 580 N.W.2d 660 (1998) ("This court has repeatedly stated that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical interpretation") (citation omitted), quoted with approval in *State v. Harris*, 2004 WI 64, ¶ 2, n.1, ___Wis. 2d ___, ___N.W.2d ___.

Similarly, the state and federal constitutions do not require police officers to electronically record custodial interrogation of juveniles. Due process does not require police to preserve evidence simply because it might later prove exculpatory. *See generally California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988); *State v. Smith*, 125 Wis. 2d 111, 130, 370 N.W.2d 827 (Ct. App. 1985), *reversed on other grounds*, 131 Wis. 2d 220, 388 N.W.2d 601 (1986).

Recognizing the absence of constitutional justification for these procedures, Jerrell asks this court to exercise its "supervisory authority over the courts" and "its judicial administration authority" to implement rules requiring police officers to comply with these procedures as a condition precedent to admission of a juvenile's custodial statement. Jerrell's brief-in-chief at 34, 38.

Notably, Jerrell does not specifically identify the source of this court's authority to act in the suggested manner. The State will assume for argument Jerrell is asking this court to act under authority of Article VII, Section 3 of the Wisconsin Constitution:

> Article VII, Section 3(1) of the Wisconsin Constitution provides that "[t]he supreme court shall have superintending and administrative authority over all courts." Under this power, we may control the course of ordinary litigation in the lower courts of Wisconsin. *Arneson v. Jezwinski*, 206 Wis. 2d 217, 226, 556 N.W.2d 721 (1996). Our application of this power may be as broad and as flexible as necessary to maintain the administration of justice in the courts of this state; however, we do not use such power lightly. *Id.* at 226. "'This court will not exercise its superintending power where there is another adequate remedy, by appeal or otherwise, for the conduct of the trial court, or where the conduct of the trial court does not threaten seriously to impose a significant hardship upon a citizen.'" *Id.* (quoting *McEwen v. Pierce County*, 90 Wis. 2d 256, 269-70, 279 N.W.2d 469 (1979)).
>
> The question of whether the court will exercise its superintending authority is one of policy, not power. *In re Phelan*, 225 Wis. 314, 320, 274 N.W. 411 (1937). "'The inherent power of this court is shaped, not by prior usage, but by the continuing necessity that this court carry out its function as a supreme court.'" *Arneson*, 206 Wis. 2d at 231 (quoting *In re Kading*, 70 Wis. 2d 508, 519, 235 N.W.2d 409 (1975)).

State ex rel. Hass v. Wisconsin Court of Appeals, 2001 WI 128, 248 Wis. 2d 634, ¶¶ 11-12, 636 N.W.2d 707. "The judiciary's explicit constitutional administrative power is a power over all the courts to ensure efficient and effective functioning of the court system." *Flynn v. Dept. of Administration,* 216 Wis. 2d 521, 549, 576 N.W.2d 245 (1998).

Jerrell wants this court to use its superintending authority to create constitutional rights where none exist. This will not do. Since this court's constitutional grant of superintending authority "is over the courts, not the executive or legislative branches," *Flynn*, 216 Wis. 2d at 548, it cannot invoke that authority to require police officers to arrange for an interested adult's presence during custodial interrogation of a juvenile, or to require the officers to electronically record the interrogation. That is because "[w]e have superintending authority over the lower courts, *not* over law enforcement." *State v.*

Jennings, 2002 WI 44, 252 Wis. 2d 228, ¶ 42 n.9, 647 N.W.2d 142 (emphasis in original). In *Jennings,* this court sensibly refused to use its superintending authority to go beyond the constitutional requirements of *Davis v. United States*, 512 U.S. 452 (1994), and require police to take the additional step, after receiving a suspect's equivocal request for counsel before custodial questioning, of asking clarifying questions in an effort to determine whether the suspect actually wants counsel.

"This court has long held that it is the province of the legislature, not the courts, to determine public policy." *Flynn*, 216 Wis. 2d at 539. The benefits and disadvantages of interested adult rules and recording custodial interrogation of juveniles should be fully debated in legislative chambers, not judicial chambers. If strong policy cases can be made for variations of the *per se* rules proposed by Jerrell, then the State, in the exercise of its legislative prerogatives, is free to implement them. *See, e.g., People v. Fike,* 577 N.W.2d 903 (Mich. App. 1998), in which the Michigan Court of Appeals declined a defendant's invitation to require taping of custodial interrogation as a matter of due process:

> Defendant next argues that he is entitled to a new trial because the police failed to make an audio or visual recording of his interview. To support his contention that the trial court sua sponte should have suppressed his confession, defendant cites an Alaska case, *Stephan v. State*, 711 P.2d 1156 (Alaska, 1985), wherein the Alaska Supreme Court held that in order to be admissible under the Due Process Clause of the Alaska Constitution, all custodial confessions (including the giving of the accused's *Miranda* rights) must be electronically recorded when the interrogation takes place in a place of detention and where recording is feasible. *Id.* at 1159-1160. In this case of first impression, defendant now urges this Court to extend Michigan's constitutional due process guarantees by adopting the same rule. We decline, however, to "fiat" our views of police practice into a constitutional mandate when the Michigan Legislature has not yet spoken on the subject.

Fike, 577 N.W.2d at 906 (footnote omitted). The legislature is better positioned to assess specific proposals.

See State v. Spurgeon, 820 P.2d 960, 961, 963 (Wash. App. Div. 1 1991):

> Spurgeon urges this court to adopt a rule requiring all custodial police interrogations to be tape recorded before any statements made by a defendant may be admitted at trial because failure to do so violates his due process rights ....
>
> . . . .
>
> ... [I]t is our view that such a sweeping change in long standing police practice should be made only after a full hearing of all the policy and financial implications and with adequate advance notice to [] law enforcement in the form of the adoption of a rule of evidence or a statute mandating recording.

The State is mindful of the circumstances under which this court accepted review of the court of appeals' decision in *Jerrell C.J.* A lengthy portion of that decision is given over to a discussion of false confessions made by juveniles during custodial interrogation. *Jerrell C.J.*, 269 Wis. 2d 442, ¶¶ 24-32. The majority opinion concludes with a call for action:

> It is this court's opinion that it is time for Wisconsin to tackle the false confession issue. We need to take appropriate action so that the youth of our state are protected from confessing to crimes they did not commit. We need to find safeguards that will balance necessary police interrogation techniques to ferret out the guilty against the need to offer adequate constitutional protections to the innocent.

Id. at ¶ 32.

The issue of false confessions by juveniles deserves careful and considered review. That task is best performed by the state legislature.

IV. Jerrell's Confession Was Sufficiently Corroborated To Support The Delinquency Adjudication.

In Part IV of his brief-in-chief, Jerrell argues that his delinquency adjudication is based entirely on his confession, and that the confession lacks sufficient corroboration. Jerrell is wrong.

The principles of law governing the sufficiency of corroboration are summarized in *State v. Verhasselt*, 83 Wis. 2d 647, 661-62, 266 N.W.2d 342 (1978) (internal quotation marks omitted):

> It is a basic principle that conviction of a crime may not be grounded on the admission or confessions of the accused alone. *Triplett v. State*, *supra*, 371, 372; *Jackson v. State*, 29 Wis.2d 225, 138 N.W.2d 260 (1965); *see also*: *Barth v. State*, 26 Wis. 2d 466, 132 N.W.2d 578 (1965).
>
> "... However, as to the need for corroborating evidence, all the elements of the crime do not have to be proved independently of an accused's confession -- it is enough that there be some corroboration of the confession in order to sustain the conviction. As this court has put it, '... The corroboration, however, can be far less than is necessary to establish the crime independently of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.'" *Triplett* v. *State*, *supra*, at 372, *quoting Holt v. State,* 17 Wis.2d 468, 480, 117 N.W.2d 626 (1962).

Here there is ample corroboration to support the delinquency adjudication of Jerrell. For clarity, any statements presented below attributed to Jerrell are references to his confession that was admitted into evidence.

Jerrell stated that, including himself, three individuals went into the McDonald's restaurant to rob it. Trial testimony corroborated that there were three robbers who entered into the McDonald's store to rob it (49:29).

Jerrell stated he and the robbers were masked (52:29). Testimony showed the robbers were masked (49:25; 50:54). Jerrell stated that they left the house shortly before midnight (52:29). The robbery of the McDonald's occurred at 12:18 a.m., shortly after midnight (49:23). And Jerrell stated that he had a black toy pistol with some orange tape around the barrel (52:29). A McDonald's employee testified that one of the robbers had a little black gun with red inside the barrel (50:54-55).

Jerrell said that Roscoe carried a dark bookbag to put the robbery proceeds in (52:29). A McDonald's employee testified that the robber who obtained the money from her, in the office had a bag and ordered her to put the money into a bag (49:27). Jerrell also said that Roscoe entered the office-type area and came back "several seconds" later and told them "let's go" (52:30). A videotape of the robbery verifies that one of the robbers went into the office; further, the robbers were in the store only about two minutes (48:62, 66).

Jerrell indicated that he and Jerrad stayed behind the counter (52:30). This also is corroborated by the videotape surveillance of the robbery and by the testimony of a McDonald's employee (48:66; 49:64-68).

Jerrell stated that the employees were ordered onto the floor (52:30). The employees were in fact ordered to the floor (50:53). Jerrell stated that they watched Roscoe count out the proceeds from the robbery and stated it was about $3,600 (52:31). An audit of the McDonald's after the robbery revealed that taken during the robbery was $3,591 (47:30-31).

Detective Mark Newell showed a surveillance photograph of the suspects from the McDonald's robbery to a citizen witness, the cousin of Jerrell and the other two individuals implicated by Jerrell—Jerrad and Roscoe. The witness identified the three robbers as Jerrell, Jerrad and Roscoe (48:4-6; 50:126-30). This

corroborates not only Jerrell's involvement, but also Jerrell's statement about the identity of the others involved.

Jerrell identifies what he believes to be significant discrepancies in the evidence that undermine the corroboration. They do not bring the strength of the corroboration into question.

As to the mask worn by Jerrell and his green eyes, the relevant evidence is not only not seriously at odds, it is corroborative. Jerrell stated he had a mask fashioned from dark t-shirt. The witness, who so well noted the remarkable eyes of the one robber, merely describes the mask as a ski mask (50:54-55, 58). Jerrell was successful in fashioning his mask—and the fact that it was referred to by witnesses as a ski mask and/or a knit ski mask simply does not undercut the corroboration of Jerrell's statement.

As to the green eyes, a McDonald's employee testified that one of the robbers had eyes that were a "pretty color" (50:56). She did not recall telling the officer any specific eye color (50:56-57). A police report was produced because it reflected, at least seemingly, that the witness following the robbery had described this pretty color as "light brown" (50:58). In further clarification on this point, the officer who interviewed the witness was called and discussed the eye color description raised by the police report. Ultimately, the description was best distilled down to "pretty" and "bright" eyes. As noted, Jerrell has green eyes, consistent and corroborative with his involvement (57:75).

As to physical evidence, the videotapes provide recorded evidence corroborating the statement of Jerrell as to how the robbery occurred (48:62, 66-67, 76). Further, the large quantity of cash ($699.00) recovered from Jerrad corroborates not only that he received a portion of the proceeds, but that there was in fact a robbery in which he was involved—as stated in his confession.

Jerrad's statement does not vary significantly from Jerrell's and it is overwhelmingly consistent (50:138-41; 52:27-32). The only arguable inconsistency is Jerrad's statement that he (Jerrad) and Jerrell received $800.00 from the robbery. There is no basis of knowledge given in Jerrad's statement. Jerrell stated that, after the money was counted, Roscoe said he would hold the money until Anthony Houston was around. Jerrad does not say that this was not said after the money was counted. Jerrad got his split, but there is no evidence as to when and it is not unreasonable to assume that Jerrad presumed that Jerrell received the same amount that he (Jerrad) received. This presumption very well could have been the foundation for Jerrad's remarks to the police.

Further, considering the claims of inconsistencies between Jerrell's and Jerrad's statements; Melvin was identified by Jerrell as a person being in the car, not going into the McDonald's. Jerrad not mentioning Melvin, who was not actively involved inside the McDonald's, is simply not at odds with Jerrell's statement. Similarly, Jerrell's and Jerrad's statements are not inconsistent when it relates to the post-robbery disposal of the guns and masks. Jerrad explained how "they" disposed of the plastic guns and mask without saying when these items were burned behind Roscoe's house and who the "they" were. Jerrell states that he last saw the guns and mask when they were put in the trunk of the car used in the robbery. Jerrad's statement relates to the ultimate disposition of the plastic guns and masks, whereas, Jerrell's statement concerns an interim disposition.

As to the gun, the witness described it as being tinny, black, and with red inside the barrel (50:54). Jerrell described the gun as being a toy, black, and with orange tape around the barrel (52:29). The location of this bright color at, on, or inside the small black gun's barrel is significantly corroborative. The juvenile court said. it well: "As I say, on the spectrum of colors, red and orange are right next to each other. And I think to

what—to one person, what might be red, could, to another, be called orange, and you could have a legitimate disagreement on that" (58:54). For a witness who was shocked, surprised, and frightened, this minute discrepancy is insignificant.

Jerrell's confession is sufficiently corroborated to support his delinquency adjudication.

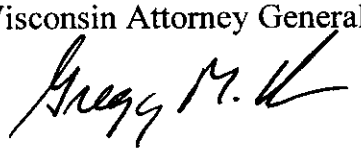
CONCLUSION

The decision of the court of appeals should be affirmed for the reasons presented in this brief-in-chief.

Dated at Madison, Wisconsin, this 23rd day of June, 2004.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Wisconsin Attorney General



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,471 words.

Dated this 23rd day of June, 2004.

GREGORY M. WEBER
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INDEX TO APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3423 Cir. Ct. No. 01 JV 1168

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE INTEREST OF JERRELL C.J.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JERRELL C.J.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 WEDEMEYER, P.J. Jerrell C.J. appeals from an order adjudging him delinquent for the commission of armed robbery, party to a crime, contrary to

WIS. STAT. §§ 943.32(1)(b) & (2) and 939.05 (2001-02).[1] He also appeals from an order denying his postdisposition motion. Jerrell claims the trial court erred in denying his motion seeking to suppress his statement. He contends that his statement was involuntary and that the police officers should have granted his request to call his parents. Because the trial court did not err in denying the motion to suppress, we affirm. We do, however, caution that a juvenile's request for parental contact should not be ignored.

I. BACKGROUND

¶2 On Sunday, May 27, 2001, at approximately 12:18 a.m., three young men entered the front door of a McDonald's restaurant in Milwaukee. Each was wearing a ski mask and holding a gun. Two of the men went into the kitchen area and told the employees to get down. The third went to the office, pointed a gun at the manager and said, "give me all the money." The manager complied and gave the robber $3590. The robbers left.

¶3 Two employees offered descriptions of the robbers. One employee stated: one was seventeen to nineteen years old, 5'10" to 5'11" tall, medium complexion and build, wearing a black hat and black knit face mask; the second was also seventeen to nineteen years old, had a lighter complexion, a thin build and was 5'8" to 5'9" tall, and wearing a knit face mask. Both were holding guns.

¶4 Another employee described the man with the lighter complexion: eighteen to twenty-three years old, light brown "bright" eyes, thin build, wearing a ski mask, holding a small black gun and "the inside of the barrel was red." That

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

evening, Roscoe H., Jerrad H. and Randall J. were detained and later arrested as suspects in the robbery. On Monday morning, May 28, 2001, at approximately 6:20 a.m., fourteen-year-old Jerrell was arrested at his home. He was taken to the police station, booked, and placed in an interrogation room. He was handcuffed to the wall of the room for approximately two hours, until 9:00 a.m. At that time, Police Detectives Ralph Spano and Kurt Sutter began the interrogation.

¶5 The two detectives entered the room, introduced themselves to Jerrell, removed his handcuffs, and asked him some background questions. Jerrell told the officers that he was fourteen years old and in eighth grade. He provided the names, addresses and phone numbers of his parents and siblings.

¶6 At 9:10 a.m., Spano advised Jerrell of his ***Miranda***[2] rights. Jerrell waived his rights and agreed to answer questions. Spano told Jerrell that his cousin, Jerrad, had "laid him out for this robbery." Jerrell denied committing any robbery. Spano encouraged Jerrell to be truthful and honest. Jerrell denied participating in the robbery. This exchange continued for the better part of the morning. At times, Spano raised his voice "short of yelling." Jerrell stated that "kind of frightened" him.

¶7 Jerrell was kept in the interrogation room until lunchtime, although several food and bathroom breaks were provided. At lunchtime, Jerrell was placed in a bullpen cell for about twenty minutes where he ate lunch. Interrogation resumed at approximately 12:30 p.m., and Spano said Jerrell "started opening up about his involvement" between 1:00 p.m. and 1:30 p.m. Also, at this time, Jerrell made two or three requests to telephone his mother or father. Spano denied the

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[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

requests, indicating that he "never" allows a suspect to talk to anyone during interrogation because it could stop the flow of, or jeopardize, the interrogation. The interrogation was completed at 2:40 p.m. when Jerrell signed a statement admitting his involvement in the McDonald's robbery.

¶8 Jerrell moved to suppress his statement, claiming it was involuntary, unreliable, and a product of coercion. The trial court denied the motion. Jerrell and Jerrad were tried jointly in a court trial. The trial court adjudged both of them delinquent for committing armed robbery, party to a crime.

¶9 Jerrell filed a postdisposition motion seeking a new trial on the basis that his admission was unreliable, untrustworthy and involuntary. The motion pointed out the inconsistencies between Jerrell's statement and that of the eyewitnesses and other participants. The suggestion was that Jerrell, in fact, did not participate in the robbery, but was coerced into admitting participation during the police interrogation. The trial court found the discrepancies between Jerrell's statement and the other evidence were not material. The court concluded that Jerrell's knowledge of the total amount of money stolen, and his description of the gun, were sufficient evidence of reliability. The trial court also found that Jerrell's statement, under the totality of the circumstances, was voluntary. Jerrell now appeals.

II. DISCUSSION

A. Statement.

¶10 The issue in this case is whether Jerrell's statement was voluntary. Jerrell contends that the statement was coerced. He argues that given his age, the length of the interrogation, the lack of corroboration and the inconsistencies in the

statement, the statement was unreliable and involuntary. The State responds that the interrogation did not involve any coercive techniques, it took place during the day, Jerrell had two prior police contacts, he was provided food and other breaks, and that any inconsistencies between Jerrell's statement and established facts can be explained. The trial court agreed with the State.

¶11 The question we must resolve involves both a constitutional issue, whether Jerrell's statement was voluntary, and a discretionary issue, whether the trial court erroneously exercised its discretion in denying Jerrell's motion to suppress the confession. In reviewing the latter, we will not disturb the trial court's findings of historical or evidentiary facts unless they are clearly erroneous. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 682, 482 N.W.2d 364 (1992). However, the former involves a constitutional issue, subject to independent appellate review. ***State v. Esser***, 166 Wis. 2d 897, 904, 480 N.W.2d 541 (Ct. App. 1992).

¶12 Our supreme court recently addressed the issue of whether a statement is voluntary in ***State v. Hoppe***, 2003 WI 43, ¶¶ 34-40, 261 Wis. 2d 294, 661 N.W.2d 407.

> A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.

Id., ¶36 (citation omitted). We first must address whether Jerrell's confession was "coerced or the product of improper pressures exercised" by the police officers conducting the interrogation. ***Id.***, ¶37. We cannot conclude that the confession was involuntary without first concluding that coercive or improper police conduct occurred. ***Id.***

¶13 In determining whether Jerrell's confession was voluntary, we consider the totality of the circumstances. ***Id.***, ¶38. This test requires "balancing ... the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." ***Id.*** Relevant factors to consider include the individual's age, maturity, intelligence, education, experience, ability to understand, and presence of parents, guardian or counsel, ***Theriault v. State***, 66 Wis. 2d 33, 42-43, 223 N.W.2d 850 (1974), as well as the defendant's physical and emotional condition, ***Hoppe***, 261 Wis. 2d 294, ¶39. We balance the personal characteristics against the police pressures and tactics employed to induce the confession, such as

> the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id. Finally, when a juvenile is involved, courts must use the "greatest care" in assessing the voluntariness of the confession. ***In re Gault***, 387 U.S. 1, 55 (1967).

¶14 We begin then with whether any coercive or improper police conduct occurred. We review whether, under the totality of the circumstances, Jerrell's statement was "coerced or suggested," or "the product of ignorance or rights or of adolescent fantasy, fright or despair." ***Gault***, 387 U.S. at 55. This test involves balancing personal characteristics of the individual against the conduct of the police during the interrogation.

¶15 The first factor to be considered is age. Jerrell was fourteen years and ten months old at the time of the interrogation. Citing ***Hardaway v. Young***, 302 F.3d 757 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1802 (2003), Jerrell argues

that this factor favors finding that the statement was not voluntarily given: "The difficulty a vulnerable child of 14 would have in making a critical decision about waiving his *Miranda* rights and voluntarily confessing cannot be understated." *See* ***id.*** at 764. He points out that the younger the child, the more carefully the court must scrutinize police interrogation tactics. *See* ***id.*** at 765. The State emphasizes that Jerrell was *almost* fifteen years old and had two prior contacts with the police in which he was advised of his ***Miranda*** rights and waived them. The State also focuses on the fact that no evidence demonstrated that Jerrell was emotionally distraught or upset by the interrogation of the officers. Rather, Jerrell seemed to be "smirking" during most of the interrogation. The trial court found that Jerrell's age did not result in a statement that was a product of "adolescent fantasy." We cannot locate anything in the record to render that finding erroneous.

¶16 Although Jerrell was under fifteen years old at the time he made his statement, there was no indication in the record that his age interfered with his ability to provide a voluntary statement. As noted by the trial court, Jerrell was emotionally stable during the entire interrogation and showed no signs of psychological breakdown as a result of the questioning.

¶17 The second factor considered is education and intelligence. The trial court noted that Jerrell was in eighth grade. Given the time of year this incident occurred, it is safe to assume that Jerrell was nearing the completion of this grade. There is some dispute, however, regarding level of intelligence. The trial court noted that Jerrell had a 3.6 grade point average and appeared to be of higher than average intelligence. Jerrell points out that the high grade point average was not typical of past grades and that his IQ tests placed him in the lower end of average intelligence. The trial court found that these factors did not interfere with Jerrell's

ability to give a voluntary statement. There is evidence in the record to support that finding and, therefore, we will not disturb it.

¶18 Additional factors to consider are Jerrell's maturity and experience. The trial court found that Jerrell appeared to be a mature, articulate individual. There was no evidence of any mental disease or defect, no indication that he was impaired by drugs, medication or alcohol, and no information suggesting he was in any physical pain or injured, and it appeared that Jerrell was "not apprehensive, fearful, [or] fretful while he was questioned." The trial court noted that immediately following the interview, Jerrell appeared "bored." The trial court also found that Jerrell had two previous contacts with police, thus suggesting that his susceptibility to coercive police tactics would be reduced. *See* ***Hardaway***, 302 F.3d at 767 (it may be presumed that children who have a history of criminal involvement are more likely to understand their ***Miranda*** rights, and less likely to be susceptible to coercive conduct). Jerrell argues that his two prior contacts were insignificant as both involved misdemeanors and not serious offenses. Although we can appreciate the distinction, the fact remains that on both of those two prior occasions, Jerrell was given his ***Miranda*** rights and waived them. Accordingly, the previous police contacts weigh in favor of finding that Jerrell's statement was voluntary.

¶19 During the questioning, Jerrell made several requests to call a parent. The trial court did not find this factor significant in this case for several reasons. First, the requests came after Jerrell had admitted involvement, and second, the denial of the request was not for the purpose of denying Jerrell his right to counsel or right to remain silent. Therefore, the trial court found that the denial did not constitute improper police conduct. Accordingly, this factor did not implicate the voluntariness of Jerrell's confession. Although we address this issue more in

depth in the latter part of this opinion, for dispositional purposes, we cannot conclude that the trial court's finding was clearly erroneous. The police officers' denial of Jerrell's request to call his parents was not *per se* coercive. ***Theriault***, 66 Wis. 2d at 38.

¶20 In reviewing the totality of the circumstances, we also examine the length and circumstances of the interrogation. Jerrell's interview took place during the daylight hours and lasted a little more than five and one-half hours. Thus, the questioning did not take place during a time period that would suggest Jerrell might have been tired and, as a result, unfairly susceptible to police questioning. *See* ***Johnson v. State***, 75 Wis. 2d 344, 355, 249 N.W.2d 593 (1977) (statement given during the time an individual would otherwise be asleep is a factor to consider when evaluating an individual's susceptibility to police pressure). During the questioning, Jerrell was afforded food and bathroom breaks, including a twenty-minute lunch break. It was estimated that throughout the interview, there were between five and seven breaks.

¶21 Jerrell points out that he was handcuffed in a bullpen cell from the time he arrived at the station after being picked up at 6:20 a.m., until the interview began at 9:00 a.m. He points out that throughout the entire morning he repeatedly denied any involvement. He stated that he was somewhat fearful when Detective Spano raised his voice. He also contended that the officers promised him that if he confessed to the truth (his involvement), he would spend only one night in jail and then could go home. Jerrell points out that there are many inconsistencies between his statement and those of Jerrad and other witnesses. For example, Jerrell's statement says that he did not have a black ski mask, so he used a black T-shirt as a mask. All of the employees of the McDonald's stated that the robbers wore black ski masks. Jerrell's statement indicates that another individual, "Melvin,"

was involved in the crime, that Melvin's car was used, and that he used some of the stolen money to buy a new cap and new shoes. Jerrad's statement, in contrast, does not mention Melvin or Melvin's car. Further, police never found the new cap or new shoes to which Jerrell referred. In addition, Jerrell contends that the eyewitnesses indicated that the light-complected robber had brown "bright" eyes. Jerrell has green eyes.

¶22 The trial court considered all of these facts in rendering its decision. It made credibility determinations between the testimony of the police officers and that of Jerrell. The trial court found the police officers' testimony to be credible and that no coercive tactics were used. The trial court concluded that under the totality of the circumstances, Jerrell's statement was voluntary and not a product of coercion. In part, the trial court supported its conclusion because Jerrell's statement contained details of the crime that an uninvolved person would not have known—such as the amount of money stolen and the description of the gun.

¶23 Having independently reviewed the totality of the circumstances and the findings of the trial court, we cannot overturn the trial court's determination, which was based, in large part, upon the credibility of the witnesses. The findings made by the trial court are not clearly erroneous and, therefore, will not be reversed by this court. Because there is no evidence of police coercion or improper conduct, we conclude that Jerrell's confession was voluntary. Based on

the foregoing, we conclude that the trial court did not erroneously exercise its discretion in denying Jerrell's request to suppress his statement.[3]

B. Request for Parents.

¶24 We address separately an issue that does not affect the disposition of this appeal, but merits special attention from this court. As noted, after Jerrell admitted involvement, but before his statement was complete, he made two or three requests to call a parent. Detective Spano denied such a request for several reasons: (1) Spano does not let "anyone call their parents or relatives during the interrogation or anybody else;" (2) he did not want to stop the flow of the confession; and (3) allowing the phone call could adversely affect the investigation because Spano would lose control relative to any information exchanged via the telephone.

¶25 Although we have concluded that, under the facts of this particular case, the request to call parents and the denial of the request did not impact on the voluntariness of Jerrell's statement, we are gravely concerned about this issue. We are not alone. The decision to confess falsely by the youth of this country is

[3] We also conclude that the trial court's credibility assessment of the psychologist's testimony offered as new evidence during the postdisposition motion was not erroneous. As the trier of fact, the trial court is the sole arbiter of the credibility of witnesses, including expert witnesses. ***State v. Kienitz***, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999). The trial court was free to accept or reject the psychologist's opinion. Here, the psychologist offered an opinion that Jerrell did not knowingly and voluntarily waive his ***Miranda*** rights. That opinion, however, was based in part upon Jerrell's representations to the psychologist. The trial court compared those representations to the testimony Jerrell offered at trial and concluded that Jerrell's statements were inconsistent and therefore could not be relied upon. As a result, the trial court found that the psychologist's opinions, based upon incredible representations, could not be deemed trustworthy. We cannot conclude that the trial court's findings were clearly erroneous or that its credibility assessment was erroneous. Accordingly, we reject Jerrell's claim that the trial court's assessment on this issue was incorrect.

the subject of numerous legal treatises across the nation. *See, e.g.*, Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997). Concerns regarding this subject were submitted to us via the amicus curiae brief filed in this case on behalf of The Children and Family Justice Center at Northwestern University School of Law's Bluhm Legal Clinic and the Wisconsin Innocence Project at the University of Wisconsin Law School's Frank J. Remington Center.

¶26 In that amicus curiae brief, the authors stated that as of April 2003, 127 wrongly convicted people have been exonerated by DNA evidence. Of the first 111, 27 involved false confessions or admissions. The amicus authors argue that current psychological interrogation techniques are a major contributing factor to the false confession problem, which is magnified when the individual is a child. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J. CRIM. L. & CRIMINOLOGY 429, 472-96 (1998). Consequently, the amicus authors ask this court for two things: (1) a *per se* rule, which would exclude confessions from any child under the age of sixteen who has been denied access to a parent or guardian; and (2) a mandatory rule requiring police to videotape all juvenile interrogations.

¶27 Although this court finds both requests compelling, we are without authority to order either. We are currently bound by the dictates of ***Theriault***, which recognizes "that special problems may arise with respect to waiver of the [***Miranda***] privilege by or on behalf of children," 66 Wis. 2d at 39 (citation omitted) but applies the totality of the circumstances test. ***Id.*** at 38-44. Our supreme court rejected a request that a *per se* rule be applied when a minor confesses without the presence of a parent or legal guardian. ***Id.*** at 44. The court

held that the absence of the parent or guardian is one factor to be considered under the totality of the circumstances test. ***Id.*** Consideration of this factor affords the trial court the discretion to determine the reason behind denying a juvenile's request to call his or her parents. *See* ***id.*** at 48. "If the police fail to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements." ***Id.*** Accordingly, we are bound by that precedent.

¶28 We do note, however, that ***Theriault*** was decided in 1974, and the debate between the totality of the circumstances test versus a *per se* rule has been the focus of much recent attention. At least 13 states—Colorado, Connecticut, Hawaii, Indiana, Iowa, Massachusetts, Montana, New Mexico, North Carolina, Oklahoma, Texas, Vermont and West Virginia—have adopted, by case law or legislative action, some form of the *per se* rule. *See* Thomas J. Von Wald, Note, *No Questions Asked! State v. Horse: A Proposition for a Per Se Rule When Interrogating Juveniles*, 48 S.D. L. REV. 143, 164 n. 237 (2002-03).

¶29 Reasons behind a *per se* rule are understandable. False confessions from juveniles are serious issues that need to be addressed. Legal scholars suggest that children simply do not understand their ***Miranda*** rights as well as adults. Grisso, *Juvenile's Capacities to Understand Miranda Warnings: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1160 (1980). The Supreme Court stated that this is so because children lack the emotional and mental capability to make fully informed decisions. *See* ***Bellotti v. Baird***, 443 U.S. 622, 640 (1979) (children are incapable of making decisions that "take account of both immediate and long-range consequences.") The implication is that, as a result, children are less capable of making important decisions. The Wisconsin legislature has recognized

this tenet in a variety of ways: an individual must be twenty-one years old to purchase alcohol, WIS. STAT. § 125.97; an individual less than eighteen years old cannot purchase tobacco products, WIS. STAT. § 134.66; sixteen and seventeen year olds cannot get married without parental permission, WIS. STAT. § 765.02; children may not buy or lease a car without parental consent, WIS. STAT. § 218.0147; children under fourteen may not change their name without parental consent, WIS. STAT. § 786.36; and girls under eighteen may not obtain an abortion without parental consent (unless certain exceptions apply), WIS. STAT. § 48.375.

¶30 One author presents studies which demonstrate that a minor is more likely to give a false confession because of the inherent nature of children to want to please authority figures, coupled with the high suggestibility levels in children. *See* Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 504-05 (2002). This article states that in some cases, "minors are incapable of fully realizing the consequences of their decisions," and therefore confess "because they believe it is the only way to end a psychologically coercive interrogation." ***Id.*** at 505. It is argued then, that taking this together with the additional knowledge that police can, without breaking any laws, lie about evidence, engage in trickery, and verbally harass suspects in order to obtain a confession, juveniles may confess to crimes they did not commit. According to one study, over a two-year period, almost a dozen juveniles in the United States who confessed to committing murder were subsequently proven innocent. ***Id.*** at 489. This problem is particularly troubling because once a child confesses, such evidence carries great weight with the fact-finder.

¶31 Having set forth the problem, the issue becomes: What is the solution? Courts and legislatures across the country are attempting to tackle the

problem. The Vermont Supreme Court has set forth three criteria that must be satisfied before a juvenile's waiver would be found to be voluntary: (1) the juvenile "must be given the opportunity to consult with an adult; (2) that adult must be one who is not only generally interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and (3) the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile." Von Wald, 48 S.D. L. REV. at 165 (citation omitted).

¶32 Alaska and Minnesota have recording requirements for all custodial interrogations. *See* ***Stephan v. State***, 711 P.2d 1156, 1159 (Alaska 1985); ***State v. Scales***, 518 N.W.2d 587, 592 (Minn. 1994). Some suggest that the "totality of the circumstances" analysis works best when it is based on a videotape of the interrogation. It is this court's opinion that it is time for Wisconsin to tackle the false confession issue. We need to take appropriate action so that the youth of our state are protected from confessing to crimes they did not commit. We need to find safeguards that will balance necessary police interrogation techniques to ferret out the guilty against the need to offer adequate constitutional protections to the innocent.

By the Court.—Orders affirmed.

Recommended for publication in the official reports.

¶33 SCHUDSON, J. (*concurring*). Although I agree with the majority's conclusion, I believe its opinion goes too far.

¶34 Was Jerrell's statement coerced? Because, as the majority correctly concludes, (1) the trial court's factual findings are not clearly erroneous, and (2) ***Theriault v. State***, 66 Wis. 2d 33, 223 N.W.2d 850 (1974), precludes the *per se* rule the Remington Center seeks, the answer is no. And here, under the totality of the circumstances, the answer is all the more clear because Jerrell's request to call his parents came *after* he confessed.

¶35 That should conclude the analysis of the central issue in this appeal. The majority, however, while acknowledging that its additional discussion "does not affect the disposition of this appeal," majority, ¶24, goes on to comment at length on various topics relating to the possible propriety of a *per se* rule, ***id.***, ¶¶25-32. In doing so, the majority approvingly cites certain case law and commentaries even though, in this case, they were not subjected to any debate or adversarial testing. This, I think, is unwise.

¶36 For sound reasons, we usually refrain from addressing issues that need not be resolved. *See* ***State v. Mikkelson***, 2002 WI App 152, ¶17 n.2, 256 Wis. 2d 132, 647 N.W.2d 421 (we decide cases on the narrowest grounds). And for equally sound reasons, we usually resist the temptation to offer advisory opinions, particularly where the subject is a complicated one that has not been thoroughly explored through the adversarial process. *See* ***State v. Robertson***, 2003 WI App 84, ¶32, 263 Wis. 2d 349, 661 N.W.2d 105 ("Courts act only to determine

actual controversies—not to announce principles of law or to render purely advisory opinions."). We should not deviate here.

¶37 Therefore, although I also am intrigued by the Remington Center's suggestions and, in particular, by its arguments favoring the videotaping of all police interrogations, I believe these issues are best left unaddressed in this appeal. Accordingly, while agreeing with much of the majority's opinion, I do not join in it entirely and, therefore, respectfully concur.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 02-3423

In the Interest of Jerrell C.J.
A Person Under the Age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JERRELL C.J.,

Respondent-Appellant-Petitioner.

ON APPEAL OF A DELINQUENCY ADJUDICATION AND DENIAL OF POSTDISPOSITION MOTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE FRANCIS T. WASELIEWSKI PRESIDING

REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER

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REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER

INTRODUCTION

Wisconsin case law on admissibility of confessions resulting from police interrogation of juveniles is skeletal. Thirty years ago, this court established the framework for totality of the circumstances analysis, in ***Theriault v. State***, 66 Wis. 2d 33, 223 N.W. 2d 850 (1974). Twenty

years ago, the court applied that framework in ***State v. Woods,*** 117 Wis. 2d 701, 345 N.W. 2d 457 (1984), holding that Woods' confession was voluntary; but the Seventh Circuit Court of Appeals later granted Woods' *habeas* petition, finding that his confession was not voluntary. ***Woods v. Clusen,*** 794 F. 2d 293 (1986).

During the last ten years, we have learned that children are particularly susceptible to falsely confessing when subjected to modern psychological interrogation techniques. *See* Steven A. Drizin & Richard A. Leo, ***The Problem of False Confessions in the Post-DNA World,*** 82 N.C.L.R. 891, 944-946, 963-971 (March, 2004).

The court's response to the three critical issues in this case—voluntariness, parental absence, and electronic recording—will define and shape juvenile interrogation and confession law in the future.

There are certain undisputed facts that bear on all three issues, and which form the framework for the court's analysis:

1. Jerrell was 14-years-old, an eighth grader. (52:22-23).

2. After being arrested and booked, Jerrell was left alone, handcuffed to the wall of an interrogation room, for 2 hours before interrogation began. (51: 25, 43-44).

3. The evidence most favorable to the state is that Detective Spano gave Jerrell standard ***Miranda*** warnings one sentence at a time, asking him if he understood each sentence. Jerrell said he did, and no other explanation or discussion of ***Miranda*** rights ensued. (51:26; 55:42).

4. Detectives Spano and Sutter interrogated Jerrell for 5½ hours, from 9:00 a.m. until 2:40 p.m. At about noon, there was a 20-minute lunch break. (52:21).

5. All morning, Jerrell denied involvement in the crime. The interrogators rejected his denials, repeatedly told him they knew he committed the crime and urged him to be "honest and truthful." (55:47-50).

6. Detective Spano raised his voice at times, making points using a "strong voice." (51: 36; 55:84).

7. Four hours into the interrogation, about ½ hour after the lunch break ended, Jerrell asked "several times" to make a telephone call to his parents. Detective Spano denied those requests, testifying that he "never" allowed juveniles to call parents. (51:29-30; 55:32).

8. Jerrell had two prior misdemeanor arrests. In both cases, he admitted to involvement then was allowed to go home. He had no prior juvenile delinquency adjudications. (11:2-4; 54:61, 81).

9. Jerrell and the detectives disagreed about many aspects of the interrogation, including:

a. Whether Spano gave Jerrell ***Miranda*** warnings at all. (51:26; 54:62-63).

b. Whether Spano promised Jerrell that he would go home after a night in detention, or merely stated that he didn't know what would happen after that night. (52:19-20).

c. Whether Spano threatened Jerrell with 65 years in prison if he didn't admit. (55:108;54:85).

d. Whether Jerrell was "kind of frightened," or bored. (51:49; 58:122).

e. Whether police told Jerrell some details of the robbery. (52:145-52; 55:98).

All of these facts bear on the issues presented: voluntariness, parental absence, and electronic recording. This brief addresses each in turn.

ARGUMENT

I. JERRELL C.J.'S WRITTEN ADMISSION WAS NOT VOLUNTARILY MADE.

Jerrell J. does not concede that the trial court properly excluded postdisposition evidence that Jerrell was of low average intelligence and was highly susceptible to suggestion. However, he contends that even if this court considers only the undisputed facts set forth above, his written confession was not "the product of a free and unconstrained will, reflecting deliberateness of choice." ***State v. Hoppe***, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 308.

A. Age.

Since 1948, federal courts have recognized the importance of age in determining whether a juvenile confession is voluntary, and it remains a critical factor. ***Haley v. Ohio,*** 332 U.S. 596, 599 (1948); ***Hardaway v. Young***, 302 F. 2d 757, 765 (7th Cir. 2002).

The state acknowledges that courts must exercise "special caution" when assessing the voluntariness of juvenile confessions, but gives **no** weight to that factor here. Ignoring or dismissing numerous federal cases stressing the importance of age and Jerrell's references to learned treatises on the comparative capacity of adolescents to understand and exercise their constitutional rights, the state cites the findings of one Connecticut circuit court where the defense attorney "failed to prove" the reliability of the "Understanding of Miranda Rights" test. The appellate court, employing the "abuse of discretion" standard, under the "great leeway" afforded

trial courts in making evidentiary warnings, affirmed. ***State v. Griffin***, 823 A. 2d 419, 431 (Conn. App. 2003).

The Connecticut court does not override numerous U.S. Supreme Court, lower federal court, and state court decisions, recognizing that age is "more than a chronological fact." ***Eddings v. Oklahoma***, 455 U.S. 104 (1982). One failure-of-proof does not override extensive research showing that age affects understanding, perspective, judgment, susceptibility to influence, and responsibility. These facts have been recognized and applied by courts and legislatures throughout the nation, not only in analyzing the voluntariness of juvenile confessions, but also in regulating a wide variety of children's legal rights and responsibilities.

Research merely confirms the wisdom of case law recognizing that age is a critical factor in the constitutional analysis of voluntariness.

B. Jerrell's Requests to Speak to His Parents.

Police denial of Jerrell's repeated requests to call his parents is more than a "single factor" with little weight, as the state asserts. (Brief, p. 10). It is "strong evidence that coercive tactics were used," ***Theriault v. State, supra***, 66 Wis. 2d at 48; and a "significant factor" that "in marginal cases . . . could tip the balance against admission." ***United States v. Wilderness,*** 160 F. 3d 1173, 1176 (7th Cir. 1998).

In this case, police not only "failed to call," but repeatedly denied Jerrell's requests to call his parents. Both detectives testified that they "never" allow a child to speak with a parent during an interrogation. If ***Theriault*** is to have any force and effect, its holding must be reaffirmed and applied to suppress Jerrell's confession.

Arizona has recently joined other state courts in holding that police exclusion of a parent from a juvenile interrogation adds a presumption of involuntariness to the totality analysis. *See* ***In re Andre M.,*** 88 P. 3d 552, ¶ 16 (April 23, 2004), (confession of 16-year-old questioned at school for short time ruled involuntary because of strong presumption of involuntariness arising from exclusion of his mother). ***Andre M.*** cited with approval ***In re State ex rel. Carlo***, 48 N.J. 224, 225 A. 2d 110, 119 (1966), holding that when parents are excluded, "the presumption arises that the juvenile's will is overborne;" and ***In re J.J.C.,*** 294 Ill. App. 3d 227, 689 N.E. 2d 1172, 1180 (Ct. App. 1998), concluding that police refusal of parental consultation "might well be sufficient in itself to show that the confessions were involuntary." ***Id.*** at ¶ 14.

The state's argument that the timing of Jerrell's requests and Detective Spano's intent in denying the requests is relevant to the voluntariness analysis, is wrong. Timing is irrelevant where, as here, Jerrell signed the written confession long after his first request for his parents. Police intent is also irrelevant, because the issue is what effect the denials had on Jerrell's ability to resist the pressure to confess. Unlike Theriault, who "vigorously protested" a police plan to call his guardian, Jerrell vigorously insisted on calling his parents, and was deprived of his "opportunity to receive advice and counsel." ***Theriault, supra,*** at 46, 48.

Police denial of Jerrell's repeated requests to talk to his parents, regardless of timing and intent, was strong evidence that Jerrell's confession was coerced.

C. Length of Custody and Interrogation.

The state does not compare the length of custody and interrogation in Jerrell's case to that discussed in other juvenile interrogation cases. Instead, it refers to an adult "list of horribles" footnote in ***Colorado v. Connelly***, 479 U.S. 157, 163, (1986). (Brief, p. 9).

Ironically, in ***Colorado v. Connelly***, the Court recognized that "interrogators have turned to more subtle forms of psychological persuasion." ***Id.*** ***Connelly*** teaches that egregious police conduct, like that described in the "list of horribles," is not necessary to a finding of involuntariness. ***State v. Hoppe,*** 2003 WI 43, ¶ 43, 261 Wis. 2d 294, 661 N.W. 2d 407.

"Lengthy interrogation or incommunicado incarceration" is strong evidence of coercion. ***Miranda v. Arizona,*** 384 U.S. 437, 476 (1966). ***Gault, supra,*** at 45, singles out lengthy interrogation as one of two factors requiring "special caution" in evaluating juvenile confessions.

In comparison to major Wisconsin and federal juvenile confession cases, Jerrell's five-plus-hour interrogation, preceded by being held incommunicado for two hours while handcuffed to the interrogation room wall, was lengthy. (See page 28a, Jerrell's brief-in-chief). Except for a 20-minute lunch break, "breaks" were brief, and sometimes involved only one of the two officers leaving the interrogation room.

Jerrell's lengthy isolation and incarceration is additional strong evidence that his confession was coerced.

D. Interrogation Tactics.

The state ignores the ***Miranda*** Court's characterization of the tactic used for more than three hours in this case--positing the suspect's guilt as fact and discouraging denials and explanations—as coercive. ***Miranda, supra,*** at 450. A variation of this tactic, continually challenging a juvenile's statement and accusing him of lying, "could easily lead a young boy to 'confess' to anything." ***A.M. v. Butler,*** 360 F. 3d 787, 800 (2004).

The state also ignores ***Hoppe, supra*** at ¶ 46, concluding, "police conduct does not need to be egregious or outrageous in order to be coercive. Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist."

Here, police forcing their version of "truth," on Jerrell, speaking to him in raised voices, leaving the room without explanation, and denying him access to his parents were tactics that exceeded Jerrell's ability to resist.

E. Understanding of *Miranda* and Prior Police Experience.

The state is wrong when it asserts that understanding of ***Miranda*** rights is not part of the totality analysis. It was an important factor in ***A.M., supra*** at 801, where the court found "no reason to believe" A.M. could understand "the standard version of his rights."

This court must not presume that Jerrell's prior police experience, where admissions to police were followed by release and subsequent dismissal or diversion, would educate Jerrell about the meaning and consequence of waiving his right to remain silent. In no juvenile case, have two misdemeanor arrests been held to be sufficient to educate a juvenile about the meaning of ***Miranda***.

F. Totality of the Circumstances.

The state argues the wrong standard of review when urging this court to defer to the trial court's "finding" that "Jerrell's statement was constitutionally voluntary." (Brief, p. 16). Constitutional voluntariness is a conclusion which this court determines ***de novo***.

The undisputed facts of this case, with proper weight given to Jerrell's age, the refusal of his requests to talk to his parents, the length of his interrogation and

incommunicado incarceration and the psychological pressure applied by the detectives, show that his admission was "the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe, supra*** at ¶ 36.

II. IN-CUSTODY CONFESSIONS BY CHILDREN UNDER AGE 16 WHO WERE NOT GIVEN AN OPPORTUNITY TO CONSULT WITH A PARENT SHOULD NOT BE ADMISSIBLE.

Jerrell asked several times to speak to his parents before he signed a police-prepared confession. Apparently unaware of the court's warning in ***Theriault***, police detectives repeatedly denied his requests and testified that they "never" allow a juvenile to consult with a parent during interrogation. These facts call for a ***per se*** parental consultation rule.

The state does not question the merits of a parental consultation rule, but instead questions this court's authority to adopt such a rule. No court which has considered this issue, to Jerrell's knowledge, has questioned its authority in this regard.

This court did not question its authority to adopt a parental consultation rule in ***Theriault, supra,*** 66 Wis. 2d 38-48. In ***In re B.M.B.***, 264 Kan. 417, 432, 955 P. 2d 1302 (1998), the court was persuaded by the merits of a parental consultation rule and the spirit of its own juvenile justice laws.

In ***In re K.W.B.***, 500 S.W. 2d 275 (Mo. App. 1973), the court reasoned from its juvenile code, which "lays great stress upon the important role of the parent in the juvenile process," to adopt a parental consultation rule. Wisconsin statutes are similar, requiring an

"immediate attempt" to notify parents when a juvenile is taken into custody, "every effort" to release to parents, notification of all court proceedings, and parental contribution to juvenile court costs. Wis. Stat. §§ 938.19(2), 938.20(2), 938.27, 938.275.

In ***In re Lewis***, 259 Ind. 431, 440, 288 N.E. 2d 138 (1972), the court relied upon common law, citing a "long term tradition," that waivers of constitutional rights by juveniles "require special precautions to insure that it be done knowingly and intelligently." Finally, in ***In re E.T.C.***, 141 Vt. 375, 379, 449 A. 2d 937 (1982), the court invoked state constitutional rights.

This court's adoption of a *per se* parental consultation rule is squarely within its constitutional superintending and administrative authority.

III. IN-CUSTODY JUVENILE CONFESSIONS SHOULD ONLY BE ADMISSIBLE IF THE INTERROGATION IS ELECTRONICALLY RECORDED.

Twice during the suppression hearing of Jerrell's co-defendant, the trial court said it wished it had a videotape of the interrogation. (50: 109, 113). The court of appeals noted the view that a totality of circumstances analysis "works best when it is based on a videotape of the interrogation," and urged "appropriate action so that the youth of our state are protected from confessing to crimes they did not commit." (Ct. App. Op., ¶ 32).

Jerrell J. does not ask this court to regulate police conduct. He requests a rule governing the admissibility of a juvenile's confession into evidence. This is clearly within the constitutional grant of superintending authority "over the courts, not the executive or legislative branches." ***Flynn v. Dept. of Administration***, 216 Wis. 2d 521, 548, 576 N.W. 2d 245 (1998). Admissibility of

evidence is "within the judiciary's core zone of exclusive authority." ***Id.*** at 545.

An electronic recording provides the courts with the best evidence from which it can determine, under the totality of the circumstances, whether a confession is voluntary. Humans forget specific facts and reconstruct inaccurately. They interpret expressions differently. With an electronic recording the court can make its own determinations. The fact that an audio recording existed in ***Hoppe*** proved to be a critical factor in that case. ***Id.***, ¶ 55.

A strong analogy to an electronic recording rule is the court-made rule regarding admission of the results of polygraphs. In ***State v. Stanislawski,*** 62 Wis. 2d 730, 216 N.W. 2d 8 (1974), this court held that polygraph test results would be admissible, but only if they met three conditions. ***Id.*** at 741. In ***State v. Dean***, 103 Wis. 2d 228, 279, 307 N.W. 2d 628 (1981), the court concluded that the "***Stanislawski*** rule" had not been a "satisfactory compromise," and announced a new rule of non-admission.

Neither ***Stanislawski*** nor ***Dean*** questioned court authority to regulate the admissibility of polygraph evidence in court. The decisions did not regulate police practice – police still use polygraphs in their investigations, knowing that the results will not be admissible in court.

Similarly, this court has authority to regulate the admissibility of confessions resulting from in-custody interrogations of juveniles. If police find unrecorded interrogations helpful, they may use them, knowing the results will not be admissible in court.

This court's duty "to ensure efficient and effective functioning of the court system," ***Flynn, supra*** at 549, will be promoted by an electronic recording requirement.

"Cost savings and related benefits [of electronic recording] include: . . . fewer pretrial motions to suppress; saving the time and costs of lengthy contested pretrial and trial hearings as to what occurred during custodial interrogations, because recordings make extensive testimony unnecessary; more guilty pleas; . . . [and] reduction in post-conviction claims of false confessions and wrongful convictions . . ." Thomas P. Sullivan, ***Police Experiences with Recording Custodial Interrogation***, 23, (2004), at http://www.law.northwestern.edu/wrongfulconvictions/Causes/CustodialInterrogations.htm.

Jerrell and his co-defendant both had suppression hearings and a lengthy trial. Four days of hearings were held on Jerrell's postdisposition claim that his confession was involuntary. All of these trial court hearings and the entire appellate process might have been avoided if Jerrell's interrogation had been electronically recorded.

Police costs, on the other hand, are small: "In the many conversations we had with police throughout the country, very few mentioned cost as a burden, and none suggested that cost warranted abandoning recordings." ***Police Experiences, id.***, at 24.

Finally, electronic recording would promote public trust in the judicial system. Rather than requiring a judicial determination of credibility each time police and defendant testimony diverge, the tape would show the answer.

CONCLUSION

Jerrell J. respectfully requests that this court vacate his delinquency adjudication and suppress his confession because it was not voluntarily made. He further requests that the court establish evidentiary rules requiring an opportunity for parental consultation during interrogation, and electronic recording of all in-custody juvenile interrogations.

Date this 14th day of July, 2004.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,885 words.

Dated this 14th day of July, 2004.

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STATE OF WISCONSIN
IN SUPREME COURT
Case No. 02-3423

In the Interest of Jerrell C. J.,
A person under the age of 17:

STATE OF WISCONSIN,
Petitioner-Respondent,
v.
JERRELL C. J.,
Respondent-Appellant-Petitioner

NONPARTY BRIEF OF THE CHILDREN AND FAMILY JUSTICE CENTER AT NORTHWESTERN UNIVERSITY SCHOOL OF LAW'S BLUHM LEGAL CLINIC, PROFESSOR EMERITA MARYGOLD S. MELLI, AND THE JUVENILE LAW CENTER

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INTRODUCTION

In the thirty years since this Court's decision in *Theriault v. State*, 66 Wis.2d 33 (1974), the "totality of the circumstances" test has failed to protect Wisconsin's children adequately from the police coercion inherent in custodial interrogations. Amici urge this Court to replace the "totality test" with the rule adopted by the Vermont Supreme Court and cited by the court of appeals in its opinion below. Ct. App. Op. ¶31 (quoting *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982)). This new rule would require that a juvenile's incriminating statements obtained during custodial interrogation are inadmissible unless, prior to questioning, the juvenile was given the opportunity to consult with an interested adult who was completely independent from the prosecution – e.g., a parent, legal guardian, or attorney – and who was informed of the juvenile's constitutional rights. *Id.*

There are at least four reasons why this rule should be adopted. First, numerous studies have shown that juveniles do not adequately understand their *Miranda* rights and the consequences of waiving them and that, in making decisions, they tend to comply with adult authority figures.

Second, new and emerging studies of the teenage brain based on brain scanning technologies which did not exist thirty years ago, demonstrate that the area of the brain which governs decision making, the weighing of risks and rewards, and the exercise of judgment is still developing into the late teen years and early twenties.

Third, in the last ten or fifteen years, largely as a result of new DNA technologies, evidence has emerged suggesting that juveniles may be at a higher risk than adults of falsely confessing when pressured by police. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post DNA Age*, 82 N.C. L. Rev. 891, 944 (2004)(documenting 40 proven juvenile confessions, including five from the infamous Central Park Jogger case). These dangers of

obtaining false confessions from juveniles have even been documented by the leading trainer of law enforcement in psychological interrogation techniques, John E. Reid and Associates. In a recent memo, Reid notes that juveniles "appear with some regularity in false confession cases" and urges graduates of its interrogation training, to "exercise extreme caution and care" when interrogating juveniles and administering their *Miranda* rights. John E. Reid and Associates, *False Confessions – The Issues,* Monthly Investigator's Tips, available at: http://www.reid.com/investigatortips.html?serial=108083943 8473936.

Finally, in the past thirty years, Wisconsin police officers and courts have failed to follow and enforce this Court's warning in *Theriault* that failure "to call the parents for the purposes of depriving the juvenile of the opportunity to receive advice and counsel" will be considered "strong evidence" that coercion was used to elicit the juvenile's statements. *Id.* at 48.

In light of these new developments, Amici urge this Court to replace the "totality test" with the *per se* rule discussed above. Such a bright-line rule will protect the constitutional rights of juvenile suspects, respect the constitutional rights of parents to participate in life-altering decisions involving their children, and give greater guidance to law enforcement and courts as to what is acceptable in conducting custodial interrogations.

Amici also urge this Court to require that police officers electronically record the entire custodial interrogations of juvenile suspects to prevent and expose false and coerced confessions and to enable fact-finders to make more accurate determinations of the voluntariness and reliability of juvenile statements.

ARGUMENT

I. THIS COURT SHOULD ADOPT A *PER SE* RULE EXCLUDING STATEMENTS OBTAINED FROM MINORS WHEN SUCH STATEMENTS ARE MADE WITHOUT PARENTAL, GUARDIAN, OR ATTORNEY CONSULTATION.

A. Children must have the opportunity to consult with an interested adult before police interrogate them.

Perhaps nowhere is a *per se* rule needed more than in the context of children caught in the maelstrom of a police interrogation. Numerous research studies have demonstrated that children under the age of 16 do not understand their *Miranda* rights as well as adults. Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Juveniles,* 32 Hofstra L. Rev. 463, 528-535 (Winter 2003). Recent studies suggest that children in this age range are less capable than adults of making long-term decisions because they discount the future more than adults do, and weigh more heavily the short-term consequences of decisions. Elizabeth S. Scott & Lawrence Steinberg, *Blaming Youth,* 81 Tex. L. Rev. 799, 814-815 (Feb. 2003). Juveniles under 16 are also more likely than adults to make choices that reflect a propensity to comply with adult authority figures, such as confessing to the police rather than remaining silent. Thomas Grisso, Lawrence Steinberg et al, *Juvenile's Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, available online at: http://www.mac-adoldev-juvjustice.org/page25.html, at 25, 30.[1]

[1]Citing *State v. Griffin,* 823 A.2d 419, 431 (Conn. App. 2003), the State questions the reliability of the instrument used by Dr. Thomas Grisso to test whether juveniles understand *Miranda.* St. Br. at 13-15. But the *Griffin* trial and appellate courts ruled without the benefit of extensive evidence related to *Daubert*, including the scientific method on which the instrument is based, the demonstrated reliability and validity of the instrument, its general acceptance, and the fact that it has been

Furthermore, this psychosocial research is buttressed by emerging research into the structure and function of the teenage brain. Using new technologies like magnetic resonance imaging (MRI), scientists have found that the pre-frontal cortex – the area of the brain involved in nearly all "high-level cognitive tasks," including decision-making and the ability to evaluate future consequences and weigh risks and rewards – does not develop fully until the late teens or early twenties. Elizabeth R. Sowell et al. *Mapping Continued Brain Growth, and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Post-Adolescent Brain Maturation, 21 J. Neursci.* 8819, 8828 (2001).[2] This is the very part of the brain that juvenile suspects need to make the series of complex decisions, including whether to assert or waive their *Miranda* rights, asked of them during police interrogations.

These developmental immaturities greatly disadvantage children during police interrogations and underscore their need for adult guidance. Children need adult assistance because they often lack the emotional and mental capability to make fully informed decisions. *See Bellotti v. Baird*, 443 U.S. 622, 640 (1979)(upholding a state law requiring parental consent to a minor's abortion, in part because a child under 18 will not or cannot make decisions that "take account of both immediate and long term consequences.") Wisconsin law recognizes that children need such guidance by requiring that parents or guardians should have a say in a variety of significant decisions affecting their children. See Ct. App. Op. at ¶ 29 (citing state laws requiring parental consent for marriage, leasing a car,

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extensively subject to peer review. Thomas Grisso, *Scary Law: Commentary on State v. Griffin*, 4 Juvenile Correctional Mental Health Report 33 (2004).

[2] More information about juvenile brain development, is available on the ABA's Juvenile Justice Center's website at http://www.abanet.org/crimjust/juvjus/resources.html#brain.

changing one's name, and having an abortion.).[3] In this way, Wisconsin law not only protects children but respects well-established constitutional rights of parents to direct the care, control, and upbringing of their children. ***H.L. v. Matheson,*** 450 U.S. 398, 412 (1981)(parental notification abortion statute designed to "protect minors by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.")

The decision to confess during an interrogation, by its very nature, requires maturity and sound judgment. It is a life-altering decision that carries with it potentially traumatic and permanent consequences. Those who confess, even if the confession is false, are likely to be detained, to face the most serious charges, to be convicted, and to receive the harshest sentences. *See* Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 472-491.

Because juveniles are less capable of making important decisions with such serious consequences, at least 13 states, according to the Court of Appeals' decision in this case, have adopted some form of a *per se* rule requiring the consultation of a parent or other interested adult. See Ct. App. Op., ¶ 28. Wisconsin should follow suit.

B. A *per se* rule is needed to guide law enforcement officers and lower courts.

The United States Supreme Court has recognized the benefit of bright-line rules to police officers and courts, stating that "*Miranda*'s holding has the virtue of informing

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[3] For an exhaustive list of similar state and federal laws, see also *Brief of Juvenile Law Center et al. as Amicus Curiae in Support of Respondent* in *Roper v. Simmons,* No. 03-633, filed in the United States Supreme Court on July 19, 2004, at 6-13, Appendix B1-32, available at: http://www.abanet.org/crimjust/juvjus/simmons/childad.pdf.

police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible. *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). These same benefits would follow from a rule guaranteeing children the right to consult with an interested adult during interrogations.

A rule is needed in this case because Wisconsin police officers have failed to heed this Courts' warning that failure to call parents would be seen as "strong evidence of coercion." A review of appellate court decisions suggests that the practice of excluding parents is widespread throughout the state. *See, e.g., In the Interests of C.W.*, 308 N.W.2d 772 (Wis. App. 1981)(Table)(12-year-old from Milwaukee); *State v. Campbell*, 321 N.W.2d 363 (Wis. App. 1982)(Table)(17-year-old from Forest County); *State v. Glotz*, 362 N.W.2d 179 (Wis. App.1984)(17-year-old from Lacrosse County); *R.E.W. v. .State*, 397 N.W.2d 157 (Wis. App. 1986)(Table)(14-year-old from Rock County). The instant case is a perfect illustration of this pervasive practice. Here, a detective from the state's largest police department not only repeatedly denied Jerrell's requests, but he testified that in his 12 years he had "never" allowed a juvenile to speak to his parents because it might "stop the flow" and jeopardize his "control" of the interrogation. (55:32; 55:79). The trial court found that the detective's actions seemed to be "consistent with the policy of the Milwaukee Police Department" (52:21; App. 105).

A *per se* rule is also needed to bring clarity and consistency to Wisconsin confession law with regard to presence of parents or other interested adults. In rejecting *per se* rules in the past, courts have argued that the "totality of the circumstances" test gives judges the flexibility to weigh a multitude of factors in determining whether a juvenile "knowingly and intelligently" waived his constitutional rights and whether the juvenile's confession is voluntary. *See, e.g.*,

Fare, 442 U.S. at 725. But legal training does not teach judges to assess child development and how to weigh the factors that make children uniquely vulnerable during interrogations. Consequently, "when judges apply the totality of the circumstances test, they exclude only the most egregiously obtained confessions and then only haphazardly." *See* Barry C. Feld, *Bad Kids 118-119* (1999). See also Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?* 1 J.Ctr. for Child. & Cts. 151 (1999).

This same haphazard pattern has been followed by Wisconsin courts in *Theriault* and the few published decisions on juvenile confessions since *Theriault.* Compare *State v. Woods,* 345 N.W.2d 457, 479n.3 (1984)(16-year-old's statement admitted despite fact that mother went to police station and was refused access to her son until after police obtained statements); *State v. Glotz*, 362 N.W.2d 179 (Wis. App. 1984)(upholding conviction of 17year-old questioned without parent) with *State v. Bendlin,* 586 N.W.2d 700 (Wis. App. 1998)(affirming suppression of 17-year-old's statements when detectives interrogated him only after his mother had left his hospital room). This pattern is also apparent when one compares the facts of *Theriault* with those in the instant case. In *Theriault,* the Court rejected a *per se* rule in a case involving a 17-year-old, who was AWOL from the Army, and who specifically told detectives that he did not want to consult with his grandmother. The instant case, however, involved a 14-year-old boy, who still resided with his parents, and who asked repeatedly to consult with them before confessing. Despite these obvious factual differences, the trial court below admitted Jerrell's statement and the court of appeals affirmed. As a result of the inconsistent application of the totality test, it is unclear in Wisconsin whether the failure to call parents or other interested adults is "strong" evidence of coercion, "some" evidence of coercion, or no evidence of coercion at all.

As long as Wisconsin's police departments and courts continue to pay lip service to the need of children to consult with interested adults during police interrogations, Wisconsin's children will be in great jeopardy of making uninformed and impulsive decisions concerning their *Miranda* rights during police interrogations and of giving false and coerced confessions.

II. ELECTRONIC RECORDING SHOULD BE MANDATED FOR ALL INTERROGATIONS OF JUVENILES TO INCREASE THE RELIABILITY OF CONFESSIONS, PREVENT FALSE AND COERCED CONFESSIONS, AND TO PROMOTE INFORMED DECISION-MAKING.

Much of the difficulty in assessing the voluntariness of Jerrell's confession stems from the fact that it is impossible to reconstruct accurately the dynamics of what happened during Jerrell's interrogation. The trial judge himself suggested the remedy to this problem when he repeatedly remarked that he wished he had a videotape of the interrogation (50:109; 50:113). This reform is necessary to increase the reliability of children's confessions and is consistent with this Court's duty to ensure that "special care" is taken when children are interrogated.

A recording requirement is especially important for child suspects because psychological research has consistently found that "age is negatively related to accuracy, completeness, and consistency [of a child's statement], and [is] positively related to [a child's] suggestibility." Allison D. Redlich, Melissa Silverman, et al., *The Police Interrogation of Children and Adolescence*, p. 114, in Interrogations, Confessions, and Entrapment (G. Daniel Lassiter, ed. 2004). As children age, they continue to develop cognitive, social and emotional skills leading to "an increased ability to engage in hypothetical and logical decision-making, to reliably remember and report events, to extend their thinking into the future and consider the long-term consequences, and to

engage in advanced social-perspective taking." *Id.* Juveniles who have yet to develop such faculties may have difficulty remembering and articulating what happened to them during the interrogation.

The extreme suggestibility of children and their eagerness to please adult authority figures also make recording a necessary safeguard against coerced or false confessions. See Lawrence Schlamm, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. Tol. L. Rev. 901 (1995). Although even mild insinuations can encourage children to voice what adults want to hear, children are often subjected to more coercive tactics, including interrupting their denials, false evidence ploys, and raised voices. Stephen J. Ceci, *Why Minors Accused of Serious Crimes Cannot Waive Counsel,* Court Review (Winter 2000), at 9. When such tactics -- some of which were used by the detective in this case -- are used to elicit confessions from children, they can produce coerced and false confessions. *See* A. Redlich & G. Goodman. *Taking responsibility for an act not committed: The influence of age and suggestibility,* 27 Law and Human Behavior 141-156 (April 2003)(in a clinical study, an overwhelming majority of teenagers complied with request to sign false confession when presented with false evidence of guilt).

Finally, the fact that juries treat evidence of a confession as more probative than nearly any other type of evidence, even if the confession is false and uncorroborated, underscores the need for a recording requirement. Drizin &. Leo, *supra*, at 921-23, 960-61 (finding that 81% of false confessors who went to trial were wrongfully convicted despite fact that little or no other credible evidence supported their confessions). By allowing factfinders to make a more informed evaluation of the quality of the interrogation and the reliability of a defendant's confession, recording will also enable them to make a more informed decision about what weight to place on confession evidence. *Id.* at 998.

CONCLUSION

Amici agree with the Court of Appeals' statement that the time has come for this Court "to tackle the false confession issue" and to revisit the merits of a per se rule. Ct. App. ¶ 32. This court should do so by 1) excluding all confessions taken from juvenile suspects where the juvenile was not given the opportunity to consult first with an informed and competent parent, attorney or guardian; and 2) requiring that police officers electronically record all custodial interrogations of juvenile suspects.

Dated this 6th day of August, 2004.

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STATE OF WISCONSIN
IN SUPREME COURT
Case No. 02-3423

In the Interest of Jerrell C. J.,
A person under the age of 17:

STATE OF WISCONSIN,
Petitioner-Respondent,
v.
JERRELL C. J.,
Respondent-Appellant-Petitioner.

NONPARTY BRIEF OF THE WISCONSIN INNOCENCE PROJECT OF THE FRANK J. REMINGTON CENTER, UNIVERSITY OF WISCONSIN LAW SCHOOL, ET AL.

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INTRODUCTION

It is counter-intuitive to imagine confessing to a crime one did not commit. But it is becoming increasingly clear that people do just that, and with alarming frequency. Indeed, false confessions are emerging as one of the leading causes of wrongful convictions. Of the 146 known postconviction DNA exonerations in the past 15 years, 36 or nearly 25% have involved false confessions. Benjamin N. Cardozo School of Law, *The Innocence Project, at* http://www.innocenceproject.org. These cases reveal that current psychological interrogation techniques are a major contributing factor to the false confession problem. *See* Leo & Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J.Crim.L. & Criminology 429, 472-496 (1998).

Take, for example, the case of Christopher Ochoa, who was exonerated in 2001 with assistance from the Wisconsin Innocence Project after almost 13 years in a Texas prison for a rape and murder he did not commit. Despite his innocence, Ochoa confessed after police subjected him to two grueling days of interrogations in which they tricked him into believing they had evidence that would convict him, yelled at him, and threatened him with abuse by other inmates and, ultimately, the death penalty. Findley & Pray, *Lessons from the Innocent*, 47 Wisconsin Academy Review No.4 (Fall 2001) at 34. DNA testing ultimately proved that Ochoa was innocent, and that another man, who had gone on to victimize other innocent women, was the actual perpetrator.

When psychological interrogation techniques are applied to children, the risk of false or coerced confessions is

magnified. The Central Park Jogger case in New York, in which five teenage boys falsely confessed to a sexual assault, only to be exonerated thirteen years later by DNA evidence, is only one in a long parade of false confessions involving children. Drizin & Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C.L.Rev. 891, 944-45, 968-70 (March 2004).

The problem is not unique to Texas or New York. In Milwaukee, Katrina French falsely confessed to the murder of a 13-month-old boy in 2002, after she was interrogated six times from 11:15 p.m. until 7:15 a.m. Charges were eventually dismissed when authorities acknowledged French's innocence. Doege, *Homicide Charges in Infant's Death Dropped,* Milwaukee Journal-Sentinel (January 15, 2002) at http://www.jsonline.com/news/metro/jan02/12902.asp. In Cudahy in 1995, Ronald Paccagnella falsely confessed to the murder of an elderly woman, only to be exonerated after ten months in jail when a friend of the true murderer came forward. Doege, *Strong Conviction,* Milwaukee Journal-Sentinel (July 24, 2003), at http://www.jsonline.com/lifestyle/people/jul03/157471.asp.

It was in this context that the court of appeals in this case declared, "it is time for Wisconsin to tackle the false confession issue." Ct. App. Op. ¶32.

Amici believe that the most important step this Court can take to address this problem is to require that all custodial interrogations of suspects in a place of detention be electronically recorded—from beginning, including during *Miranda* warnings, to end. If Christopher Ochoa's interrogation had been recorded, police either would have been deterred from engaging in the abusive tactics that

coerced his confession, or those tactics—and the fact that police fed Ochoa each of the facts that made his six-page, single-spaced confession sound so convincing—would have been exposed. Likewise, if the Central Park Jogger case interrogations had been taped in their entirety (only the final confessions were taped), the lengthy process that led the youths to confess would have been revealed, and those wrongful convictions might have been avoided.

Recording protects not only the accused; it also produces powerful evidence that can help convict the guilty, prevents baseless motions to suppress, encourages guilty pleas, and protects police from false claims of misconduct. Recording also helps courts determine the truth.

While *amici* believe that this protection should be extended to *all* custodial interrogations of suspects, this case offers this Court an opportunity to begin by addressing the problem in a measured way, requiring it first in one of the circumstances where it is needed most—custodial interrogations of juveniles.

ARGUMENT

ELECTRONIC RECORDING SHOULD BE MANDATED FOR ALL CUSTODIAL INTERROGATIONS OF JUVENILES.

A. Recording is a "best practice" reform whose time has come.

To date, two states—Alaska and Minnesota—have adopted an electronic recording requirement by court decision. *See* ***Stephan v. State***, 711 P.2d 1156 (Alaska 1985); ***State v. Scales***, 518 N.W.2d 587 (Minn. 1994). Police and

prosecutors in those states have become outspoken proponents of recording. *See* Amy Klobuchar, *Eye on Interrogations; How videotaping serves the cause of justice*, Washington Post (June 10, 2002).

Other courts are considering the issue as well. Recently, the New Jersey Supreme Court established a committee to study the use of electronic recording of custodial interrogations. ***State v. Cook***, 847 A.2d 530, 546-47 (N.J. 2004). The Massachusetts Supreme Court is also now deciding whether to mandate recording of custodial interrogations. ***Commonwealth v. Valerio DiGiambattista***, SJC 09155, at http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/9155amicus_digiambattista.html.

Other jurisdictions are taking a new look at recording as well. In Illinois, numerous false confessions led the legislature to mandate recording in homicide cases. 20 ILCS 3930/7.2. Maine has followed suit. 25 MRSA 2803-B (2004). False confession scandals in Prince Georges County, Maryland,[1] and Broward County, Florida,[2] led authorities there to adopt new taping policies. In Milwaukee, Katrina French's false confession led District Attorney E. Michael McCann to suggest that Milwaukee police start taping interrogations. Doege, *Prosecutor backs taping interrogations,* Milwaukee Journal-Sentinel (May 6, 2002), at http://www.jsonline.com/news/metro/-may02/41209.asp. Recently, the ABA called on legislatures and courts to

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[1] Witt, *Prince George's Police to Install Video Cameras,* Washington Post, Feb.1, 2002, at B4.

[2] DeMarzo and DeVise, *Judge Overturns Conviction in Murder of Broward Deputy,* Miami Herald, March 20, 2003, at 1A.

mandate recording. ABA House of Delegates Report 8-A (February 2004) at http://www.abanet.org/leadership/2004/dailyjournal.

Experiences in Minnesota, Alaska, and hundreds of other jurisdictions that now record demonstrate that the benefits to the criminal justice system greatly outweigh the costs, both real and perceived. *See* Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations* (Summer 2004), at http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/CustodialInterrogations.htm (identifying 238 police jurisdictions that record). The time has come for this Court to adopt a recording requirement in this state.

B. An electronic recording requirement is essential to the accurate and efficient functioning of the courts and the criminal justice system.

Electronic recordings provide courts with accurate and reliable evidence. Courts are routinely called upon to determine the admissibility of confessions, with all the attendant complexity that determination involves. Without a contemporaneous record of the interrogation, judges are forced to rely on the biased recollections of suspects and law enforcement officials to reconstruct what occurred inside the interrogation room. As the Alaska Supreme Court has noted, "[t]he result, then, is a swearing match between the law enforcement official and the defendant, which the courts must resolve." ***Stephan***, 711 P.2d at 1161.

Electronic recording enables judges to conduct nuanced reviews to resolve admissibility issues, and permits juries to determine whether a suspect's purported confession was reliable. *See, e.g.*, ***State v. Hoppe***, 2003 WI 43, 261

Wis.2d 294, 661 N.W.2d 407 (recording enabled Court to note that suspect's "voice was slurred and that he spoke slowly with long pauses," and that at times he appeared to be hallucinating). Simply put, recording advances the truth-finding process. Donovan & Rhodes, *The Case for Recording Interrogations,* The Champion 13 (December 2002).

After surveying law enforcement agencies nationwide, Thomas Sullivan, former United States Attorney for the Northern District of Illinois and Co-Chair of Illinois Governor Ryan's Commission on Capital Punishment, observed:

> A contemporaneous electronic record of suspect interviews has proven to be an efficient and powerful law enforcement tool. Audio is good, video is better. ... Recordings prevent disputes about officers' conduct, the treatment of suspects and statements they made. Police are not called upon to paraphrase statements or try later to describe suspects' words, actions, and attitudes. Instead, viewers and listeners see and/or hear precisely what was said and done, including whether suspects were forthcoming or evasive, changed their versions of events, and appeared sincere and innocent or deceitful and guilty.

Sullivan, *supra*, at 6.

Courts spend an inordinate amount of time determining *Miranda* and voluntariness issues. This case alone has generated three days of trial, four days of postconviction hearings, and two appeals, none of which would have occurred had law enforcement officials recorded the interrogation. The trial judge repeatedly remarked that he wished he had a videotape of the interrogation (50:109, 113). Electronic recordings drastically reduce the time courts spend on these issues. "Experience shows that recordings

dramatically reduce the number of defense motions to suppress statements and confessions." Sullivan at 8.

The Wisconsin judicial system already requires recording of depositions, trials, and appellate arguments. Custodial interrogations are at least as—probably more—important, given that the outcome of a case is usually sealed once police obtain a confession. *Cf.*, ***United States v. Wade***, 388 U.S. 218, 224 (1967)("today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality").

Recording also protects police from spurious claims of misconduct. As the Alaska Supreme Court noted, recording protects "the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics." ***Stephan***, 711 P.2d at 1161. Suspects are unable to contradict an objective record of the interrogation. *See* Sullivan at 8.

Recording also improves the quality and professionalism of law enforcement interrogations. Police report that "[r]ecordings permit detectives to focus on the suspect rather than taking copious notes of the interview. When officers later review the recordings they often observe inconsistencies and evasive conduct which they overlooked while the interview was in progress." Sullivan at 10. Recordings make it "unnecessary for detectives to struggle to recall details when writing reports or testifying about past interviews...." *Id.* at 12. Many agencies that record use the recordings for training purposes. *Id.* at 16. And recording deters officers who might be inclined to engage in improper tactics or misstate what was said. *Id.*

C. Fears about recording are unwarranted.

Recording has a track record that demonstrates that fears about recording are unfounded. The fears include:

- *Suspects who know they are being recorded will refuse to talk to police.*

"[S]cores of veteran detectives have found these fears to be unfounded." Sullivan at 20. Even if suspects are aware that they are being recorded, "when interviews get underway any initial hesitation fades and suspects focus attention on the subject of their interview." *Id.; see also, Policy Review*, International Association of Chiefs of Police and National Law Enforcement Policy Center (1998)(finding "little conclusive evidence" that recording makes suspects less willing to talk; indeed, police who recorded "were able to get more incriminating information from suspects on tape than they were in traditional interrogations")(quoted in Sullivan at 22). In fact, police find that recording can make suspects more cooperative because interrogators do not need to take notes during the interrogation. According to a detective in Arizona, for example, "the absence of notes frequently makes the subject more at ease and does not alert him/her to key phrases which may be of special interest at a later time." Sullivan at 11.

Where a suspect does refuse to speak while being recorded, there is a simple remedy: Every jurisdiction permits police to turn off the recording device and continue with the interview. *See* ***Stephan***, 711 P.2d at 1162; ***State v. Lee***, No. Co-98-1135, 1999 WL 227394, at*2 (Minn. Ct. App. May 22, 2001); 725 ILCS 5/103-2.1(e)(vi). Sullivan's survey of law enforcement concludes that "[n]one of the hundreds of

detectives we spoke with regarded this procedure to be an impediment to obtaining suspects' cooperation." Sullivan at 21.

- *Requiring recording will lead to suppression of confessions based on technicalities and escape of the guilty.*

Again, experience does not support this concern. Every jurisdiction that requires recording excuses the failure to record when that failure was occasioned by good faith error or equipment malfunction or where the violation was insignificant or the contents of the interrogation were not in dispute. *See, e.g.*, ***State v. Schroeder***, 560 N.W.2d 739, 740-41 (Minn. Ct. App. 1997); ***State v. Miller***, 573 N.W.2d 661, 674-75 (Minn. 1998); ***Bright v. State***, 826 P.2d 765, 773-74 (Alaska Ct. App. 1992); 725 ILCS 5/103-2.1(e); American Law Institute's Model code of Pre-Arraignment Procedure (1975)(calling for mandatory recording, but providing for suppression only for "substantial" violations, determined, in part, by "the extent to which the violation was willful"). Recording is not required if not feasible, or if failure to record was due to inadvertent error or oversight.

- *Recording is too expensive.*

Although there are costs involved with recording, the benefits and savings outweigh the costs. Costs include start-up expenses for purchasing equipment, setting up interrogation rooms, and training officers. Sullivan at 23. On-going costs include tape purchases, tape storage, and transcription fees. *Id.*

Most of these costs can be minimized. Although high-tech digital video systems are best, inexpensive alternatives

exist for cash-strapped departments. Many Minnesota and Alaska police departments, for example, rely on inexpensive hand-held micro-cassette tape recorders. *See, e.g.,* ***State v. Munson***, 594 N.W.2d 128, 133 (Minn. 1999). Although transcripts can add expense, they are needed only when disputes about an interrogation or confession arise.

The savings can be enormous, both from fewer suppression motions and trials, and less civil litigation. Christopher Ochoa and his codefendant together settled lawsuits for $14.3 million against the City of Austin, Texas, because police coerced Ochoa's false confession. Kertscher, *Wrongly imprisoned man wins $5.3 million settlement*, Milwaukee Journal-Sentinel (December 8, 2003), at http://www.jsonline.com/news/state/dec03/191269.asp. Videotaping likely would have prevented that miscarriage of justice, and its attendant cost.

In sum, Sullivan reports that "[i]n the many conversations we had with police across the country, very few mentioned cost as a burden, and none suggested that cost warranted abandoning recordings." *Id.* at 24.

D. This court should order recording either as a matter of due process or in the exercise of its superintending authority.

The Alaska Supreme Court in ***Stephan*** relied upon the Alaska constitution's due process clause to mandate recording. The Court held that recording "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately his right to a fair trial." 711 P.2d at 1159. *See also* Christopher Slobogin, *Toward Taping*,

1 OHIO ST.J.CRIM.L. 309 (2003).

Although Wisconsin has interpreted the due process clauses of the state and federal constitutions to be "substantially equivalent," ***State v. Vanmanivong***, 261 Wis.2d 202, ¶29 fn.7, 661 N.W.2d 76 (2003), this Court has also said that it "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin ... require[s] that greater protection of citizens' liberties ought to be afforded." ***State v. Doe***, 78 Wis.2d 161, 172, 254 N.W.2d 210 (1977).

Alternatively, this Court, like the Minnesota Supreme Court in ***Scales***, has the superintending authority to ensure the reliability of evidence introduced in the courts in this state. The Wisconsin Constitution grants this Court "superintending and administrative authority over all courts." Wis. Const. art. VII, §3(1). This provision gives this Court the "inherent power to adopt those statewide measures which are absolutely essential to the due administration of justice in the state." ***State v. Kading***, 70 Wis.2d 508, 518, 235 N.W.2d 409 (1975). This is "a power that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice." ***Arneson v. Jezwinski***, 206 Wis.2d 217, 225, 556 N.W.2d 721 (1996).

Although this Court has authority over the courts, and not the other branches of government, it has authority to adopt the recording requirement because it is a rule of admissibility governing proceedings in court. The rule does not make it illegal for police to interrogate without recording; the rule simply provides that, with appropriate exceptions, when the state offers evidence created by state authorities themselves

during an interrogation, the state must produce the best evidence reasonably possible.

Although this Court exercises its superintending authority cautiously, the Court has used it to impose rules governing judicial proceedings. *E.g.*, ***In the Interest of N.E.***, 122 Wis.2d 198, 199, 361 N.W.2d 693 (1985)(waiver of juvenile statutory jury trial right); ***In re Grady***, 118 Wis.2d 762, 776, 348 N.W.2d 559 (1984)(time limits for court decisions).

Plainly, this Court has authority to adopt rules governing the admissibility of evidence, including rules that affect the nature of police investigations. Although not expressly relying upon its superintending authority, the Court has, for example, fashioned rules governing the admissibility of polygraph evidence. *E.g.*, ***State v. Dean***, 103 Wis.2d 228, 244, 307 N.W.2d 628 (1981).

Indeed, in ***State v. Armstrong***, 110 wis.2d 555, 329 N.W.2d 386 (1983), the Court adopted recording as one of the criteria to consider before admitting hypnotically refreshed testimony. The Court wrote: "To aid the trial court in determining whether the hypnotic session was characterized by undue suggestiveness, we suggest that the judge review the session with guidelines similar to the ones set out below in mind." *Id.* at n.23. Guideline number 4 provided: "*All contact between the [hypnotist] and the subject should be videotaped from beginning to end.*" *Id.* (emphasis added). Although the Court did not specifically cite its superintending authority, and did not mandate recording absolutely, the decision makes clear that this Court has the authority to regulate the flow of evidence in the lower courts, including by regulating the nature of evidence developed and presented by

law enforcement.

The Court should invoke that authority here.

CONCLUSION

For these reasons, this court should require that police officers videotape all custodial interrogations of juvenile suspects in their entirety, consistent with the rules adopted by the Minnesota and Alaska Supreme Courts.

Dated this 6th day of August, 2004.

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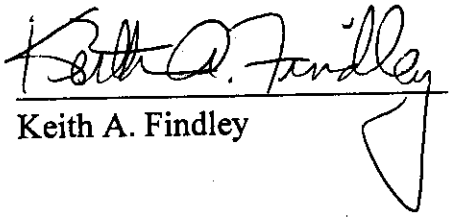

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